16C C.J.S. Constitutional Law VII XVIII I Refs.

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Constitutional Law
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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

Topic Summary | Correlation Table

Research References

A.L.R. Library

A.L.R. Index, Constitutional Law
A.L.R. Index, Due Process
A.L.R. Index, Fair and Impartial Trial
A.L.R. Index, Jury Trials
West's A.L.R. Digest, Constitutional Law 4555 to 4558, 4599, 4604 to 4608, 4614 to 4616, 4620 to 4623, 4629, 4636 to 4646, 4650 to 4652, 4673 to 4679, 4689, 4692, 4717, 4752, 4754 to 4757, 4761, 4782, 4788 to 4793

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

1. In General

§ 1699. Settled course of judicial procedure; competency to stand trial

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4599, 4782

Due process of law in criminal prosecutions requires a trial according to a settled course of judicial procedure which does not violate fundamental and established rights.

Generally, due process of law in criminal prosecutions requires a trial according to a settled course of judicial procedure which does not violate fundamental and established rights.[1]

Competency to stand trial.

Due process prohibits the criminal prosecution of a defendant who is not competent to stand trial, and the State must provide procedures for determining the defendant's competence.[2] A trial judge must conduct a competency hearing, regardless of whether defense counsel requests one, whenever the evidence before the judge raises a bona fide doubt about the defendant's competence to stand trial.[3]

Footnotes

1 Ill.—People v. Harris, 68 Ill. App. 3d 12, 24 Ill. Dec. 648, 385 N.E.2d 789 (5th Dist. 1979).

2 U.S.—Williams v. Woodford, 384 F.3d 567 (9th Cir. 2004).

3 U.S.—Williams v. Woodford, 384 F.3d 567 (9th Cir. 2004).

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

1. In General

§ 1700. Joinder, consolidation, and severance

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4607, 4608

An accused is not denied due process of law by being subjected to a joint trial of separate offenses, and joint trials involving many defendants do not per se deny due process.

An accused is not denied due process of law by being subjected to a joint trial of separate offenses,[1] and an ex parte, sua sponte order of the trial court directing the consolidation of charges contained in two informations filed against accused is not violative of due process.[2] Also, while such procedure is not recommended, the trial court does not deprive accused in a murder trial of due process by consolidating the trial for murder before a jury with a hearing before the court on the State's motion to revoke probation.[3]

However, the joinder laws must never be used to deny a criminal defendant's right to due process.[4] The joinder of counts for trial may be so egregiously prejudicial as to constitute a denial of due process.[5] Due process may require that the defendant be allowed separate trials on charges relating to two offenses where the charges, among other things, are severable as not a part of the same transaction.[6]

Joint trials involving many defendants do not per se deny due process,[7] and where there is no prejudice to the defendant, denial of the defendant's motion for severance does not result in the deprivation of rights under the Due Process Clause.[8] However, a denial of a motion for severance of a trial from other codefendants may constitute a violation of due process.[9] To be successful, a defendant seeking severance must clearly show that the joinder will result in prejudice to him or her.[10] Prejudice is shown when an impermissible joinder has a substantial and injurious effect or influence in determining the jury's verdict.[11]

The simultaneous trial of two defendants in the same courtroom before two juries is not per se violative of due process.[12] Trial courts are cautioned to bear in mind that the dual jury procedure requires great diligence on the part of the trial judge and the cooperation of the attorneys to take the precautions necessary to assure due process throughout the joint trial.[13]

Footnotes

1 U.S.—Corbett v. Bordenkircher, 615 F.2d 722 (6th Cir. 1980).
Testimony
Joinder of causes against the defendant did not constitute prejudicial error under the Fifth Amendment, contrary to the defendant's claim that joinder compelled him to testify in both causes when it was his preference to testify in only one.
Ohio—State v. Roberts, 62 Ohio St. 2d 170, 16 Ohio Op. 3d 201, 405 N.E.2d 247 (1980).

2 Iowa—State v. Trudo, 253 N.W.2d 101 (Iowa 1977).

3 Tex.—Moreno v. State, 587 S.W.2d 405 (Tex. Crim. App. 1979).

4 Cal.—Calderon v. Superior Court, 87 Cal. App. 4th 933, 104 Cal. Rptr. 2d 903 (2d Dist. 2001).

5 U.S.—Webber v. Scott, 390 F.3d 1169 (10th Cir. 2004); Cooper v. McGrath, 314 F. Supp. 2d 967 (N.D. Cal. 2004).

6 Utah—State v. McCumber, 622 P.2d 353 (Utah 1980).

7 U.S.—U.S. v. Lane, 474 U.S. 438, 106 S. Ct. 725, 88 L. Ed. 2d 814 (1986).
Cal.—People v. Diaz, 276 Cal. App. 2d 547, 81 Cal. Rptr. 16 (5th Dist. 1969).
Murder prosecution
A joint trial with codefendants did not violate defendant's due process rights in a murder prosecution, even if the jury heard evidence that was admissible against only a codefendant, where defendant and codefendants were charged with murder of a single victim, and trying them together allowed the State to present a complete chronology of what happened.
U.S.—Johnson v. Bett, 349 F.3d 1030 (7th Cir. 2003).

8 U.S.—Grech v. Wainwright, 492 F.2d 747 (5th Cir. 1974).
Ga.—Dollar v. State, 161 Ga. App. 428, 288 S.E.2d 689 (1982).
Testimony
Where defendant took the stand and could correct on direct examination, by his own testimony, any distortion caused by admission into evidence of his redacted statement, edited to exclude any reference to his codefendant, denial of defendant's motion for severance did not result in any deprivation of his rights under the Due Process Clause.
U.S.—U. S. ex rel. Stewart v. Redman, 470 F. Supp. 50 (D. Del. 1979).

9 U.S.—Byrd v. Wainwright, 428 F.2d 1017 (5th Cir. 1970); Cooper v. McGrath, 314 F. Supp. 2d 967 (N.D. Cal. 2004).
Rights secured by severance
Among the specific trial rights that a motion for severance of defendants is intended to secure is the right to present a defense and call witnesses on one's own behalf; this guarantee is a fundamental component of due process of law.
D,C.—Williams v. U.S., 884 A.2d 587 (D.C. 2005).

10 Cal.—People v. Musselwhite, 17 Cal. 4th 1216, 74 Cal. Rptr. 2d 212, 954 P.2d 475 (1998), as modified on denial of reh'g, (June 24, 1998).
D.C.—Williams v. U.S., 884 A.2d 587 (D.C. 2005).
Ga.—Styles v. State, 279 Ga. 134, 610 S.E.2d 23 (2005).
Nev.—Honeycutt v. State, 118 Nev. 660, 56 P.3d 362 (2002) (overruled on other grounds by, Carter v. State, 121 Nev. 759, 121 P.3d 592 (2005)).

11 U.S.—Wildman v. Johnson, 261 F.3d 832 (9th Cir. 2001).

12 U.S.—Smith v. DeRobertis, 758 F.2d 1151 (7th Cir. 1985).

13 Okla.—Wilson v. State, 1998 OK CR 73, 983 P.2d 448 (Okla. Crim. App. 1998).

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XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

1. In General

§ 1701. Public trial

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4604

The right of an accused to a public trial, guaranteed by the Sixth Amendment, applies to the states by virtue of the Due Process Clause of the Fourteenth Amendment.

The right of accused to a public trial, guaranteed by the Sixth Amendment, applies to the states by virtue of the Due Process Clause of the Fourteenth Amendment.[1] Generally, a failure to hold a public trial violates the Due Process Clause,[2] and the violation of the constitutional right to a public trial has been treated as a structural error, not subject to harmless error analysis.[3] However, the inherent power to limit public access has become a common and integral aspect of due process[4] especially in trials for particularly sensitive crimes[5] or, for instance, where the closure is necessary to protect a witness' identity.[6] Nevertheless, it has been said that although a trial court may close part of a trial upon a rigorous analysis, protection of the basic constitutional right to a public trial calls for a trial court to resist a closure motion except under the most unusual circumstances.[7]

The members of public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials.[8] In the absence of showing actual prejudice, the constitutional guaranty of due process of law may be violated by a public's

presence at a trial only if the surrounding circumstances are so extreme in nature and extent as to create a substantial and inherent probability that the trial cannot be fairly conducted.[9] A court's refusal to close defendant's trial to the public over the prosecution's objection does not violate defendant's due process.[10] Due process requires some notice to the public before a trial court may close a criminal proceeding.[11]

Private investigation by court.

Because in any criminal prosecution all proceedings against the accused must be open and in the accused's presence, a private investigation by the court constitutes a denial of due process.[12]

Footnotes

1 U.S.—Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972).
Conn.—State v. Molnar, 79 Conn. App. 91, 829 A.2d 439 (2003), judgment aff'd, 271 Conn. 641, 858 A.2d 767 (2004).

2 U.S.—Caudill v. Peyton, 368 F.2d 563 (4th Cir. 1966).

3 N.C.—State v. Comeaux, 741 S.E.2d 346 (N.C. Ct. App. 2012), review denied, 366 N.C. 584, 739 S.E.2d 853 (2013).

4 N.Y.—Gannett Co., Inc. v. De Pasquale, 43 N.Y.2d 370, 401 N.Y.S.2d 756, 372 N.E.2d 544 (1977), judgment aff'd, 443 U.S. 368, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979).
Child under certain age
Absent any showing of prejudice to defendant's public trial rights, trial court did not violate any constitutional right to due process in public trial by conducting competency hearing in private under statute providing for competency hearing as to any child under 10 years of age produced as a witness, to be held publicly or separate and apart with counsel present.
Or.—State v. Romel, 57 Or. App. 372, 644 P.2d 643 (1982).

5 N.Y.—Gannett Co., Inc. v. De Pasquale, 43 N.Y.2d 370, 401 N.Y.S.2d 756, 372 N.E.2d 544 (1977), judgment aff'd, 443 U.S. 368, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979).

6 N.Y.—Gannett Co., Inc. v. De Pasquale, 43 N.Y.2d 370, 401 N.Y.S.2d 756, 372 N.E.2d 544 (1977), judgment aff'd, 443 U.S. 368, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979).

7 Wash.—State v. Wise, 176 Wash. 2d 1, 288 P.3d 1113 (2012).

8 **Public and press excluded**
Any Fourteenth Amendment right of press to attend criminal trial was not violated by orders excluding public and press from pretrial suppression hearing in murder prosecution and temporarily denying access to transcript of suppression hearing in order to insure that defendants received fair trial.
U.S.—Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979).

9 Me.—State v. Beaudoin, 386 A.2d 731 (Me. 1978).

10 U.S.—U.S. v. Powers, 622 F.2d 317 (8th Cir. 1980).

11 U.S.—U.S. v. Criden, 675 F.2d 550 (3d Cir. 1982).
Due process denied
Where request for closure of arraignment and sentencing hearing occurred at commencement of docket of 55 cases, and trial judge made no mention of request until he ordered courtroom cleared, denied reporters' request to delay closure proceedings until their attorneys could be heard, and gave no reasons for closure, judge's conduct constituted complete denial of due process requirements.
Fla.—Palm Beach Newspapers, Inc. v. Nourse, 413 So. 2d 467 (Fla. 4th DCA 1982).

12 Ill.—People v. Savage, 5 Ill. 2d 296, 125 N.E.2d 449 (1955).
Presence of accused at trial as due process right, see § 1702.

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I. Trial

1. In General

§ 1702. Presence of accused and counsel

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4614 to 4616

Due process generally requires the presence of the accused and counsel at all stages of a criminal trial, but the presence of the accused is a condition of due process to the extent that a fair and just hearing would be thwarted by the accused's absence.

As a general rule, due process requires the presence of the accused[1] and the accused's counsel[2] at all stages of a criminal trial. The defendant's right to be present at the trial derives from the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment.[3] The right of the defendant to be present at trial is protected by the Due Process Clause in situations where the defendant is not actually confronting witnesses or evidence against the defendant.[4] However, defendant's due process right to be present at trial is not all-encompassing or absolute,[5] and due process does not assure the presence when presence would be useless or the benefit but a shadow.[6] The presence of the defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by the accused's absence,[7] which means that the accused has a right to be present at all critical stages of the proceedings,[8] whenever his or her presence has a relation, reasonably substantial, to the fullness of the opportunity to defend against the charge.[9]

Accordingly, a trial conducted in the absence of the defendant,[10] or defendant's absence from so many stages of the trial,[11] may constitute a deprivation of due process if it is shown to have impaired his or her ability to conduct a defense.[12]

In the absence of injury to the accused's substantial rights, due process of law is not denied by the occasional absence of accused from the trial[13] as where the accused is excluded from a particular part of the proceeding,[14] such as jury view of the scene of the crime.[15] Also, due process is not denied by the defendant's absence at the hearing of motions,[16] on argument relating to admission of testimony,[17] or on a question of law,[18] in proceedings such as appeals and applications for writs,[19] or when the court enters an order for the correction of its record.[20] A record containing daily entries showing the presence of all parties and counsel during the trial is a compliance with due process of law in this respect.[21]

The defendant's absence from a pretrial suppression hearing,[22] or from an in-chambers hearing to inquire into a potential conflict of interest on the part of defense counsel,[23] is a violation of due process. However, a defendant has no right to be present at a posttrial hearing to correct a transcript.[24] The defendant's constitutional right to be present at every stage of the trial includes the right to be present during ex parte communications between the judge and jury.[25] However, the defendant is not denied due process when the defendant is not present when the court receives and responds to the jury's inquiry where the question posed by the jury is one of law.[26] Also, the defendant's absence is not a due process violation during the jury challenging process[27] or where the clerk of court is performing ministerial acts connected with the jury.[28]

The impairment of a defendant's credibility caused by the defendant's mandatory presence at trial does not violate due process.[29]

Unruly conduct by accused.

Due process does not require the presence of the defendant if the defendant's presence means that there will be no orderly process at all.[30] While there are cases where a physical restraint of the defendant is required, where the defendant must forego significant benefits, such as the right to confront the witnesses against the defendant and the right to testify on the defendant's own behalf, due process requires that a clear need for such restraint be shown.[31]

Waiver; voluntary absence.

The defendant may, consonant with the Due Process Clause, waive the right to be present at the trial of the case,[32] and there is no denial of due process where the defendant's absence from the trial is voluntary.[33] In order to satisfy due process requirements, the trial judge must make every effort to determine if the defendant has waived the right to be present.[34]

CUMULATIVE SUPPLEMENT

Cases:

In situations where confrontation is not at issue, criminal defendant's right to be present at trial is protected by Fifth Amendment Due Process Clause. U.S. Const. Amends. 5, 6. United States v. Brown, 945 F.3d 597 (1st Cir. 2019).

The Fifth Amendment guarantees a defendant the right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings. U.S. Const. Amend. 5. United States v. Muslim, 944 F.3d 154 (4th Cir. 2019).

Where rule specifying when a defendant must be and when he need not be present during his criminal prosecution does not require a defendant's presence, there is no due process concern regarding a defendant's absence from a proceeding. U.S. Const. Amend. 5; Fed. R. Crim. P. 43. United States v. Denson, 963 F.3d 1080 (11th Cir. 2020).

Admission of victim's video deposition at trial did not violate defendant's due process right to be present in prosecution for aggravated battery to a senior citizen causing great bodily harm; defendant's right to confrontation was not violated by admission of deposition and, thus, there was no violation of underlying substantial right. U.S.C.A. Const.Amends. 6, 14. People v. Hood, 2016 IL 118581, 409 Ill. Dec. 1, 67 N.E.3d 213 (Ill. 2016).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Diaz v. Herbert, 317 F. Supp. 2d 462 (S.D. N.Y. 2004).
Ala.—Peraita v. State, 897 So. 2d 1161 (Ala. Crim. App. 2003), aff'd, 897 So. 2d 1227 (Ala. 2004).
Fla.—Israel v. State, 837 So. 2d 381 (Fla. 2002).
Mass.—Querubin v. Com., 440 Mass. 108, 795 N.E.2d 534 (2003).
Minn.—State v. Martin, 723 N.W.2d 613 (Minn. 2006).
Ohio—State v. Davis, 116 Ohio St. 3d 404, 2008-Ohio-2, 880 N.E.2d 31 (2008).
Wis.—State v. Alexander, 2013 WI 70, 349 Wis. 2d 327, 833 N.W.2d 126 (2013).
Wyo.—Belden v. State, 2003 WY 89, 73 P.3d 1041 (Wyo. 2003).
Confrontation not involved
(1) Although the right to be present is largely rooted in the Sixth Amendment's confrontation clause, the Fourteenth Amendment's Due Process Clause also entitles the criminal defendant to be present when not actually confronting witnesses or evidence against him or her.
Ariz.—Morehart v. Barton, 226 Ariz. 510, 250 P.3d 1139 (2011).
(2) In some circumstances that do not involve the confronting of witnesses or evidence against a defendant, the right to be present at trial is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.
N.J.—State v. Dellisanti, 203 N.J. 444, 4 A.3d 531 (2010).

2 U.S.—Polizzi v. U.S., 550 F.2d 1133 (9th Cir. 1976).
Idaho—State v. Crawford, 99 Idaho 87, 577 P.2d 1135 (1978).

3 U.S.—Insyxiengmay v. Morgan, 403 F.3d 657 (9th Cir. 2005).
Ala.—Peraita v. State, 897 So. 2d 1161 (Ala. Crim. App. 2003), aff'd, 897 So. 2d 1227 (Ala. 2004).
Kan.—State v. Carver, 32 Kan. App. 2d 1070, 95 P.3d 104 (2004).
Minn.—Ford v. State, 690 N.W.2d 706 (Minn. 2005).
As to right of accused to be confronted by witnesses against accused, see § 1728.

4 U.S.—U.S. v. Gagnon, 470 U.S. 522, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985); Moore v. Knight, 368 F.3d 936 (7th Cir. 2004).

5 U.S.—U.S. v. Veatch, 674 F.2d 1217 (9th Cir. 1981).
Mass.—Com. v. Evans, 438 Mass. 142, 778 N.E.2d 885 (2002).

6 U.S.—Snyder v. Com. of Mass., 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674, 90 A.L.R. 575 (1934) (overruled in part on other grounds by, Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)); U.S. v. Walls, 577 F.2d 690, 3 Fed. R. Evid. Serv. 621 (9th Cir. 1978).
Ga.—Bishop v. State, 179 Ga. App. 606, 347 S.E.2d 350 (1986).
Exclusion from competency hearing
Defendant's due process rights were not violated by his exclusion from competency hearing of two child witnesses in sexual abuse prosecution, where no questions regarding substantive testimony that girls would have given during trial were asked at hearing, but rather, all questions were directed solely to each child's

ability to recollect and narrate facts, ability to distinguish between truth and falsehood, and sense of moral obligation to tell the truth.

U.S.—Kentucky v. Stincer, 482 U.S. 730, 107 S. Ct. 2658, 96 L. Ed. 2d 631, 22 Fed. R. Evid. Serv. 1164 (1987).

7 U.S.—Snyder v. Com. of Mass., 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674, 90 A.L.R. 575 (1934) (overruled in part on other grounds by, Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)).

Ky.—Soto v. Com., 139 S.W.3d 827 (Ky. 2004).

La.—State v. Turner, 859 So. 2d 911 (La. Ct. App. 2d Cir. 2003), writ denied, 871 So. 2d 347 (La. 2004).

Va.—Baldwin v. Com., 43 Va. App. 415, 598 S.E.2d 754 (2004).

Withdrawal of counsel

Where the court permitted counsel to withdraw in the absence of the accused and without giving the accused an opportunity to be heard in the matter, there was a denial of due process, and the conviction would not stand.

Pa.—Com. v. Strada, 171 Pa. Super. 358, 90 A.2d 335 (1952).

8 Haw.—State v. Kaulia, 128 Haw. 479, 291 P.3d 377 (2013), as corrected, (Jan. 4, 2013).

Mass.—Robinson v. Com., 445 Mass. 280, 837 N.E.2d 241 (2005).

9 U.S.—Kentucky v. Stincer, 482 U.S. 730, 107 S. Ct. 2658, 96 L. Ed. 2d 631, 22 Fed. R. Evid. Serv. 1164 (1987).

Cal.—People v. Panah, 35 Cal. 4th 395, 25 Cal. Rptr. 3d 672, 107 P.3d 790 (2005).

Mo.—State v. Manzella, 128 S.W.3d 602 (Mo. Ct. App. E.D. 2004).

N.Y.—Mays-Watt v. Hernandez, 196 Misc. 2d 56, 763 N.Y.S.2d 707 (Sup 2003).

Tex.—Routier v. State, 112 S.W.3d 554 (Tex. Crim. App. 2003).

10 Cal.—People v. Avila, 117 Cal. App. 4th 771, 11 Cal. Rptr. 3d 894 (5th Dist. 2004).

Video-audio trial at home or hospital

Conducting of video-audio trial in which ill defendant would participate in privacy of his home or hospital by use of single television camera which would report trial and which would be operated by untrained, unsworn, and nonlegal technician, together with telephone by which defendant would communicate with counsel and court, would violate defendant's rights under Sixth and Fourteenth Amendments and thus was impermissible.

N.Y.—People v. Piazza, 92 Misc. 2d 813, 401 N.Y.S.2d 371 (Sup 1977).

11 U.S.—Badger v. Cardwell, 587 F.2d 968 (9th Cir. 1978).

12 Okla.—Stouffer v. State, 2006 OK CR 46, 147 P.3d 245 (Okla. Crim. App. 2006).

13 U.S.—Frank v. Mangum, 237 U.S. 309, 35 S. Ct. 582, 59 L. Ed. 969 (1915); U.S. v. Lyon, 567 F.2d 777, 2 Fed. R. Evid. Serv. 1198 (8th Cir. 1977).

Ill.—People v. Peeples, 205 Ill. 2d 480, 275 Ill. Dec. 870, 793 N.E.2d 641 (2002).

14 U.S.—U.S. v. Veatch, 674 F.2d 1217 (9th Cir. 1981); Hayton v. Egeler, 405 F. Supp. 1133 (E.D. Mich. 1975), judgment aff'd, 555 F.2d 599 (6th Cir. 1977).

Or.—State v. Romel, 57 Or. App. 372, 644 P.2d 643 (1982).

15 U.S.—Snyder v. Com. of Mass., 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674, 90 A.L.R. 575 (1934) (overruled in part on other grounds by, Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)).

Ohio—State v. Cassano, 96 Ohio St. 3d 94, 2002-Ohio-3751, 772 N.E.2d 81 (2002).

16 Cal.—People v. Isby, 30 Cal. 2d 879, 186 P.2d 405 (1947).

Motion for evidentiary hearing regarding competency to stand trial

U.S.—U.S. v. Veatch, 674 F.2d 1217 (9th Cir. 1981).

17 U.S.—U.S. v. Gore, 130 F. Supp. 117 (W.D. Ky. 1955), judgment aff'd, 234 F.2d 658 (6th Cir. 1956).

18 U.S.—U.S. v. Johnson, 129 F.2d 954, 144 A.L.R. 182 (C.C.A. 3d Cir. 1942), judgment aff'd, 318 U.S. 189, 63 S. Ct. 549, 87 L. Ed. 704 (1943).

Iowa—State v. Anderson, 308 N.W.2d 42 (Iowa 1981).

19 Wash.—Whipple v. Smith, 33 Wash. 2d 615, 206 P.2d 510 (1949).

20 Ill.—People v. Hirschberg, 410 Ill. 165, 101 N.E.2d 520 (1951).

21 U.S.—Gaines v. State of Washington, 277 U.S. 81, 48 S. Ct. 468, 72 L. Ed. 793 (1928).

22 Minn.—State v. Grey, 256 N.W.2d 74 (Minn. 1977).

23 Conn.—State v. Lopez, 271 Conn. 724, 859 A.2d 898 (2004).

24 Mo.—State v. Manzella, 128 S.W.3d 602 (Mo. Ct. App. E.D. 2004).

25 U.S.—U.S. v. Gagnon, 470 U.S. 522, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985); Moore v. Knight, 368 F.3d 936 (7th Cir. 2004).

Alaska—Crouse v. Municipality of Anchorage, 79 P.3d 660 (Alaska Ct. App. 2003).

26 Wis.—May v. State, 97 Wis. 2d 175, 293 N.W.2d 478 (1980).

Supplemental instructions

(1) Defendant was not denied due process by being excluded from an ex parte conference between the jury foreman and the trial court at the bench where it appeared that sole purpose of conference was to elicit further instructions on the law in the case.

Ga.—Brannon v. State, 163 Ga. App. 340, 295 S.E.2d 110 (1982).

(2) Where defense counsel was present and no oral communication was made to the jury, the fact that the trial court gave certain supplemental instructions while the defendant was not personally present in the court did not violate due process.

Wash.—State v. Jury, 19 Wash. App. 256, 576 P.2d 1302 (Div. 2 1978).

27 La.—State v. Sias, 861 So. 2d 829 (La. Ct. App. 3d Cir. 2003).

Wholly legal exercise

The act of peremptorily challenging the jury is a wholly legal exercise and the defendant's absence from such stage of the proceedings is in no way violative of the defendant's due process rights.

Mont.—State v. Hart, 191 Mont. 375, 625 P.2d 21 (1981).

28 Cal.—People v. Johnston, 140 Cal. App. 729, 35 P.2d 1074 (2d Dist. 1934).

29 U.S.—Portuondo v. Agard, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47, 53 Fed. R. Evid. Serv. 337 (2000).

30 Ill.—People v. Heidelberg, 33 Ill. App. 3d 574, 338 N.E.2d 56 (3d Dist. 1975).

Va.—Quintana v. Com., 224 Va. 127, 295 S.E.2d 643 (1982).

Repeated warning by judge

Where prior to removal from the courtroom the accused had been repeatedly warned by the trial judge that he would be removed if he persisted in his unruly conduct, and it appeared that the accused would not have been at all dissuaded by the trial judge's use of his criminal contempt powers, and the accused was constantly informed that he could return to the trial when he would agree to conduct himself in an orderly manner, the accused by persisting in disruptive conduct lost his constitutional right to be present throughout the trial, and removal of the accused from the courtroom and proceeding with the trial in his absence until he promised to conduct himself properly was not unconstitutional.

U.S.—Illinois v. Allen, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).

31 U.S.—Hardin v. Estelle, 365 F. Supp. 39 (W.D. Tex. 1973), judgment aff'd, 484 F.2d 944 (5th Cir. 1973).

32 U.S.—Byrd v. Hopper, 405 F. Supp. 1323 (N.D. Ga. 1976), judgment aff'd, 537 F.2d 1303 (5th Cir. 1976).

Mich.—People v. Thomas, 46 Mich. App. 312, 208 N.W.2d 51 (1973).

33 U.S.—U.S. v. Taylor, 478 F.2d 689 (1st Cir. 1973), decision aff'd, 414 U.S. 17, 94 S. Ct. 194, 38 L. Ed. 2d 174 (1973).

Ariz.—State v. Thibeault, 131 Ariz. 192, 639 P.2d 382 (Ct. App. Div. 2 1981).

Opportunity to return to courtroom after exclusion

Where defendant's sole disruptive action was in noncompliance with trial court's direction to be seated, his exclusion from trial was not justified, but where court reconsidered its decision and attempted to have defendant return to the courtroom, and defendant, despite being afforded repeated opportunities, continually refused to return and elected to absent himself from proceedings, defendant was not denied due process and fair trial.

Ill.—People v. Johnson, 24 Ill. App. 3d 152, 320 N.E.2d 69 (1st Dist. 1974).

34 R.I.—State v. Holland, 430 A.2d 1263 (R.I. 1981).

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16C C.J.S. Constitutional Law § 1703

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Constitutional Law
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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

1. In General

§ 1703. Bias and prejudice

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4558, 4621

Every person charged with a crime has an absolute right to a trial before an impartial judge and unprejudiced jury, in an atmosphere of judicial calm, free from bias and outside influence.

The Due Process Clause requires that every person charged with a crime has an absolute right to a trial before an impartial judge and unprejudiced jury,[1] in an atmosphere of judicial calm,[2] free from bias[3] and outside influences.[4] Due process requires the trial judge, if he or she becomes aware of a possible source of bias, to determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudiced.[5] An informal in camera hearing may be adequate to investigate a colorable claim of juror bias; due process requires only that all parties be represented and that the investigation be reasonably calculated to resolve the doubts raised about the juror's impartiality.[6]

Disclosing other offenses.

Juror exposure to information about the defendant's prior convictions does not alone presumptively deprive the defendant of due process.[7] However, such information may be substantially prejudicial if it is irrelevant and improperly admitted by the prosecution so as to deprive the accused of due process.[8]

CUMULATIVE SUPPLEMENT

Cases:

Trial judge acted impartially, and thus did not violate defendant's due process rights, in extending defendant's supervised probation from term of six years to life; while prosecution entered into plea agreement with defendant dismissing probation violation proceedings and felony charge of sexual exploitation of a child, judge exercised statutory discretion to extend probation in light of pending federal charge of possessing child pornography. U.S. Const. Amend. 14; Idaho Code Ann. § 20-222. State v. Gibbs, 405 P.3d 567 (Idaho 2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Parker v. Gladden, 385 U.S. 363, 87 S. Ct. 468, 17 L. Ed. 2d 420 (1966).
Ind.—Lampitok v. State, 817 N.E.2d 630 (Ind. Ct. App. 2004).
Md.—Archer v. State, 383 Md. 329, 859 A.2d 210 (2004).
N.C.—State v. Brinkley, 159 N.C. App. 446, 583 S.E.2d 335 (2003).
Due process requiring fair and impartial trial or hearing, generally, see § 1719.
Prejudice resulting from excessive publicity, see § 1704.
Impartial judge
Cal.—People v. Cowan, 50 Cal. 4th 401, 113 Cal. Rptr. 3d 850, 236 P.3d 1074 (2010).
Ga.—Brunson v. State, 293 Ga. 226, 744 S.E.2d 695 (2013).
Mass.—Com. v. Hensley, 454 Mass. 721, 913 N.E.2d 339 (2009).
Mont.—State v. Walton, 2014 MT 41, 374 Mont. 38, 318 P.3d 1024 (2014).

2 Conn.—State v. Solek, 66 Conn. App. 72, 783 A.2d 1123 (2001).
N.C.—State v. Brinkley, 159 N.C. App. 446, 583 S.E.2d 335 (2003).

3 U.S.—U.S. v. Nelson, 277 F.3d 164 (2d Cir. 2002).
Ky.—Wheeler v. Com., 121 S.W.3d 173 (Ky. 2003), as modified on denial of reh'g, (Dec. 18, 2003).
Judge's exposure to bad facts about defendant not sufficient
U.S.—Coley v. Bagley, 706 F.3d 741 (6th Cir. 2013), cert. denied, 134 S. Ct. 513, 187 L. Ed. 2d 371 (2013).
No bias or interest
The Due Process Clause of the Fourteenth Amendment requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of his particular case.
Del.—Butler v. State, 95 A.3d 21 (Del. 2014).
Fundamental unfairness
A criminal trial before a biased judge is fundamentally unfair and denies a defendant due process of law.
Ohio—State v. Jackson, 141 Ohio St. 3d 171, 2014-Ohio-3707, 23 N.E.3d 1023 (2014).
Appraisal of psychological tendencies and human weakness
In considering a criminal defendant's due process claim of judicial bias, the court of appeals must ask whether under a realistic appraisal of psychological tendencies and human weakness, the judge's interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.
U.S.—Hurles v. Ryan, 752 F.3d 768 (9th Cir. 2014), petition for certiorari filed, 135 S. Ct. 710, 190 L. Ed. 2d 461 (2014).

Arresting officer as defendant's interpreter

There is an inherent possibility of bias, and a violation of due process rights, whenever an arresting police officer is called upon to serve as the defendant's interpreter at trial.

Del.—Gonzales v. State, 372 A.2d 191 (Del. 1977).

4 U.S.—Sheppard v. Maxwell, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966); Pursell v. Horn, 187 F. Supp. 2d 260 (W.D. Pa. 2002).

Mob influence

(1) The presence of mob influence during the course of a trial may be such as to constitute actual interference with the course of justice as a result of which an accused may be denied his right to due process.

U.S.—Luallen v. Neil, 453 F.2d 428 (6th Cir. 1971).

(2) Due process is denied where the trial is dominated by the spirit of mob violence.

U.S.—Frank v. Mangum, 237 U.S. 309, 35 S. Ct. 582, 59 L. Ed. 969 (1915).

5 U.S.—Oswald v. Bertrand, 374 F.3d 475 (7th Cir. 2004).

6 U.S.—Dyer v. Calderon, 151 F.3d 970 (9th Cir. 1998).

7 U.S.—Murphy v. Florida, 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975).

Tex.—Jackson v. State, 402 S.W.2d 742 (Tex. Crim. App. 1966).

8 Haw.—State v. Keliiholokai, 58 Haw. 356, 569 P.2d 891 (1977).

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16C C.J.S. Constitutional Law § 1704

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

1. In General

§ 1704. Improper publicity

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4605

A criminal defendant has a due process right to protection from prejudicial pretrial publicity.

A criminal defendant has a due process right to protection from prejudicial pretrial publicity.[1] In order to be denied due process of law as a result of pretrial publicity, prejudicial publicity must be of such a magnitude that it dominates the proceedings and reduces the trial to a mockery of justice,[2] and deprives accused of the right to a fair trial.[3]

It has been said that in order to establish the deprivation of due process, the defendant must show that potential jurors were actually prejudiced by pretrial publicity,[4] but there may be a denial of due process because of publicity even though no direct showing of prejudice is made.[5] While there must exist a nexus between community prejudice and jury prejudice before there is a deprivation of due process,[6] the nature of publicity may be so inherently prejudicial that there is no need to show a nexus between publicity and actual jury prejudice.[7] Due process of law may be denied where there is a strong community feeling of prejudgment which makes such a strong impression that it influences, or probably could influence, a decision of the average person.[8]

Juror exposure to news accounts concerning the crime with which the defendant is charged does not create an automatic presumption of the deprivation of due process.[9] Due process requires only that a juror exposed to potentially prejudicial publicity can lay aside the juror's impression or opinion and render a verdict based on the evidence presented in court.[10]

The focus in determining whether there has been a due process violation from prejudicial publicity is on the totality of the circumstances at the trial.[11] Accordingly, in various instances, it has been held that due process has been denied[12] or that publicity was not such as to deprive the accused of due process.[13]

Footnotes

1 U.S.—Gardner v. Norris, 949 F. Supp. 1359 (E.D. Ark. 1996).

2 U.S.—Bronstein v. Wainwright, 646 F.2d 1048 (5th Cir. 1981).

Massive and pervasive publicity

(1) Massive adverse publicity and the intrusion of representatives of the news media into the trial itself can so alter or destroy the constitutionally necessary judicial atmosphere and decorum that the requirements of impartiality imposed by due process of law are denied to the defendant.

U.S.—Hilliard v. State of Ariz., 362 F.2d 908 (9th Cir. 1966).

(2) There may be a denial of a fair trial as guaranteed by the due process clause where the publicity is massive, is pervasive, and results in influences on the jury which are disruptive and prejudicial.

Kan.—State v. Eldridge, 197 Kan. 694, 421 P.2d 170 (1966).

3 U.S.—U.S. v. Holder, 399 F. Supp. 220 (D.S.D. 1975).

Mass.—Delle Chiaie v. Com., 367 Mass. 527, 327 N.E.2d 696 (1975).

Impossibility to have impartial jury

Due process has been denied where the court can conclude, on an objective basis, that an impartial jury was an impossibility because of extensive news media exposure.

Mich.—People v. Pearson, 13 Mich. App. 371, 164 N.W.2d 568 (1968).

4 U.S.—Richardson v. Newland, 342 F. Supp. 2d 900 (E.D. Cal. 2004), rev'd in part on other grounds, 171 Fed. Appx. 156 (9th Cir. 2006).

5 N.M.—State v. Chavez, 1967-NMSC-228, 78 N.M. 446, 432 P.2d 411 (1967).

6 U.S.—Hale v. U.S., 435 F.2d 737 (5th Cir. 1970); Johnson v. Beto, 337 F. Supp. 1371 (S.D. Tex. 1972), judgment aff'd, 469 F.2d 1396 (5th Cir. 1972).

Ariz.—State v. Skaggs, 120 Ariz. 467, 586 P.2d 1279 (1978).

7 U.S.—Johnson v. Beto, 337 F. Supp. 1371 (S.D. Tex. 1972), judgment aff'd, 469 F.2d 1396 (5th Cir. 1972).

Pa.—Com. v. Pierce, 451 Pa. 190, 303 A.2d 209 (1973).

8 Mich.—People v. Pearson, 13 Mich. App. 371, 164 N.W.2d 568 (1968).

Presumption of prejudice

Adverse pretrial publicity can create a presumption of prejudice in a community, making it difficult to believe the jurors' claims that they can be impartial.

Neb.—State v. Erickson, 281 Neb. 31, 793 N.W.2d 155 (2011).

9 U.S.—Murphy v. Florida, 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975).

Conn.—State v. Kelly, 256 Conn. 23, 770 A.2d 908 (2001).

Neb.—State v. Galindo, 278 Neb. 599, 774 N.W.2d 190 (2009).

N.C.—State v. Farmer, 138 N.C. App. 127, 530 S.E.2d 584 (2000).

Tex.—Russell v. State, 146 S.W.3d 705 (Tex. App. Texarkana 2004).

10 U.S.—U.S. v. Garza, 664 F.2d 135 (7th Cir. 1981).

Ill.—People v. Jones, 65 Ill. App. 3d 1033, 22 Ill. Dec. 763, 383 N.E.2d 239 (4th Dist. 1978).

Newspaper account of death of defendant's relative

The defendant in a murder prosecution was not denied the Fourteenth Amendment right to a fair trial by virtue of the alleged fact that one juror saw a copy of the newspaper which apparently reported the death of the defendant's brother in a gangland-like shooting.

U.S.—McLaughlin v. Vinzant, 522 F.2d 448 (1st Cir. 1975).

11 U.S.—Murphy v. Florida, 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975).

Okla.—Hain v. State, 1996 OK CR 26, 919 P.2d 1130 (Okla. Crim. App. 1996).

12 U.S.—U. S. ex rel. Dessus v. Com. of Pa., 316 F. Supp. 411 (E.D. Pa. 1970), order aff'd, 452 F.2d 557 (3d Cir. 1971).

Referring to defendant as "ex-con" and "vice figure"

Newspaper articles which repeatedly referred to the defendant as an "ex-con" and "vice figure" together with a radio and TV broadcast in which the speaker said that the petitioner should be in a workhouse for life deprived the petitioner of due process.

Ohio—Forsythe v. State, 12 Ohio Misc. 99, 41 Ohio Op. 2d 104, 230 N.E.2d 681 (C.P. 1967).

13 U.S.—Coleman v. Mitchell, 268 F.3d 417, 2001 FED App. 0367P (6th Cir. 2001).

Ga.—WALB-TV, Inc. v. Gibson, 269 Ga. 564, 501 S.E.2d 821 (1998).

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16C C.J.S. Constitutional Law § 1705

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

1. In General

§ 1705. Right to qualified and competent judge

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4620

In a criminal prosecution, the right to a qualified and competent judge who is fair, impartial, and unbiased is guaranteed by the due process clause.

In a criminal case, the right to a qualified and competent judge,[1] and one who is fair, impartial, and unbiased,[2] is guaranteed by the due process clause. Not only does a defendant have the right to a fair and disinterested judge, but the defendant is also entitled to a judge who has the appearance of being impartial and disinterested.[3] However, most questions concerning a judge's qualifications to hear a case are not constitutional ones because the Due Process Clause establishes a constitutional floor, not a uniform standard.[4]

A trial of a criminal case by a nontenured judge does not result in a denial of due process.[5] Also, a trial before a nonattorney judge does not violate due process[6] even where a jail sentence may be imposed.[7] However, there is authority to the effect that permitting a nonattorney judge to preside over a criminal trial of an offense punishable by a jail sentence denies due process[8] unless the accused or the accused's counsel waives the right to have an attorney judge preside.[9]

The substitution of a judge during a criminal trial does not violate the defendant's due process rights.[10]

CUMULATIVE SUPPLEMENT

Cases:

Under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case, which requires the judge's disqualification. U.S.C.A. Const.Amend. 14. Williams v. Pennsylvania, 136 S. Ct. 1899 (2016).

[END OF SUPPLEMENT]

Footnotes

1 Fla.—Treiman v. State ex rel. Miner, 343 So. 2d 819 (Fla. 1977).
Retired judge
That a trial on a criminal charge was conducted before a retired judge did not deny the defendant due process though such judge assertedly was neither answerable to the electorate of the county nor appointed by the governor.
Tex.—Lewis v. State, 481 S.W.2d 139 (Tex. Crim. App. 1972).

2 U.S.—Bracy v. Gramley, 520 U.S. 899, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997).
Ohio—State v. Skatzes, 104 Ohio St. 3d 195, 2004-Ohio-6391, 819 N.E.2d 215 (2004).
Wash.—In re Davis, 152 Wash. 2d 647, 101 P.3d 1 (2004).

3 Md.—Archer v. State, 383 Md. 329, 859 A.2d 210 (2004).

4 U.S.—Bracy v. Gramley, 520 U.S. 899, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997).

5 U.S.—Palmore v. U.S., 411 U.S. 389, 93 S. Ct. 1670, 36 L. Ed. 2d 342 (1973).
Colo.—People, by and on Behalf of People of City of Thornton v. Horan, 192 Colo. 144, 556 P.2d 1217 (1976).

6 Wyo.—Canaday v. State, 687 P.2d 897 (Wyo. 1984).
Traffic offenses
The fact that bills that confined prosecution of certain specified traffic offenses to a justice of the peace court would permit adjudication of those offenses by judges who were not members of the state bar without the right of appeal to the court of common pleas did not violate any due process right to a law-trained judge where the potential penalties for the specified offenses did not include incarceration and involved fines of less than $100.
Del.—In re Request for an Opinion of Justices of Delaware Supreme Court Regarding House Bills Nos. 134 and 135 of 146th General Assembly, 37 A.3d 860 (Del. 2012).

7 Fla.—Treiman v. State ex rel. Miner, 343 So. 2d 819 (Fla. 1977).
Trial de novo
(1) An accused, subject to possible imprisonment, is not denied due process when tried before a nonlawyer police court judge with a later trial de novo available under a state's two-tier court system.
U.S.—North v. Russell, 427 U.S. 328, 96 S. Ct. 2709, 49 L. Ed. 2d 534 (1976).
(2) A state system which provides for nonattorney judges in small sparsely populated areas, only in misdemeanor and gross misdemeanor cases, with a de novo review from all cases, unless review is voluntarily waived, meets due process of law standards.
Wash.—Young v. Konz, 91 Wash. 2d 532, 588 P.2d 1360 (1979).

8 Cal.—Gordon v. Justice Court, 12 Cal. 3d 323, 115 Cal. Rptr. 632, 525 P.2d 72, 71 A.L.R.3d 551 (1974).

9 Cal.—Gordon v. Justice Court, 12 Cal. 3d 323, 115 Cal. Rptr. 632, 525 P.2d 72, 71 A.L.R.3d 551 (1974).

10 Cal.—People v. Moreda, 118 Cal. App. 4th 507, 13 Cal. Rptr. 3d 154 (1st Dist. 2004).

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16C C.J.S. Constitutional Law § 1706

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

1. In General

§ 1706. Right to qualified and competent judge—Disqualification of judge or magistrate

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4622

Due process of law is denied by a trial before a judge, mayor, or justice of the peace who has a direct, personal, substantial pecuniary interest in reaching a conclusion against the accused.

Due process of law is denied by trial before a judge, mayor, or justice of the peace who has a direct, personal, substantial pecuniary interest in reaching a conclusion against the accused,[1] as, for example, by reason of the judge's compensation being dependent on fines and costs,[2] or where the judge is responsible for the financial condition of a municipality.[3] However, due process is not denied where the compensation of a judge, or mayor, is not dependent upon the conviction of any accused person.[4]

Moreover, in some cases, due process is not denied because of various considerations, such as the smallness of the fees, the existence of other sources for their payment, and the safeguarding of the interests of accused by giving the accused rights to a change of venue, a jury trial, and an appeal.[5] The question of disqualification is waived by failure to raise it before hearing on appeal,[6] and notwithstanding the pecuniary interest or other disqualification of a mayor or justice of the peace, due process of law is awarded where a trial de novo before an impartial tribunal is had on appeal.[7]

In a class of cases involving large fines, the interest of a mayor, who is chief executive of the municipality, in improving the financial condition of the municipality may be such as to render a trial before him or her a denial of due process.[8] It is otherwise as to a mayor receiving only a salary under a commission form of government since he or she has no executive duties, and the mayor's relation, as a member of the commission, to the executive or financial policy of the city is remote.[9] On the same principle, it is also otherwise as to a county judge who is presiding officer of the financial board of the county.[10] Questions of judicial qualification, including matters of kinship, personal bias, state policy, and remoteness of interest, generally involve matters of legislative discretion and do not involve constitutional validity.[11]

The right to a hearing before a judge who has not determined the issue in advance should not be denied where determination of guilt may result in deprivation of liberty or property.[12] Commingling of functions of a judge and prosecutor in one person who tries, convicts, and sentences accused is a denial of due process.[13] So, there is a denial of due process of law where a justice of the peace attempts to discharge the duties of both arresting officer and trial judge[14] or where there is a refusal to hear evidence of the judge's prejudice on request for removal of a case triable without a jury.[15] The fact that the same judge presides over various phases of a criminal prosecution involving the same defendant,[16] or hears both of two cases against the defendant,[17] does not necessarily constitute a denial of due process. Also, the fact that the same judge does not preside over all phases of the trial does not deprive defendant of due process.[18]

Due process does not require recusal in criminal cases,[19] and a judge's failure to disqualify himself or herself because of purported bias or prejudice does not per se deny due process.[20]

Absent a showing that a judge actually exhibited bias or prejudice as a result of presiding over defendant's first trial, denial of defendant's motion to change judges in regard to his second trial on remand does not result in a due process violation.[21]

CUMULATIVE SUPPLEMENT

Cases:

When the objective risk of actual bias on the part of a judge rises to an unconstitutional level, under the Due Process Clause, the failure to recuse cannot be deemed harmless. U.S.C.A. Const.Amend. 14. Williams v. Pennsylvania, 136 S. Ct. 1899 (2016).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Tumey v. State of Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio L. Abs. 159, 5 Ohio L. Abs. 185, 50 A.L.R. 1243 (1927).
Ill.—People v. Anderson, 95 Ill. App. 3d 143, 50 Ill. Dec. 364, 419 N.E.2d 472 (1st Dist. 1981).

2 U.S.—Ward v. Village of Monroeville, Ohio, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972); Tumey v. State of Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio L. Abs. 159, 5 Ohio L. Abs. 185, 50 A.L.R. 1243 (1927).
W. Va.—Keith v. Gerber, 156 W. Va. 787, 197 S.E.2d 310 (1973).

3 Ohio—City of Hilliard v. May, 48 Ohio Misc. 4, 2 Ohio Op. 3d 160, 356 N.E.2d 510 (Mun. Ct. 1976).

4 Ark.—Gore v. Emerson, 262 Ark. 463, 557 S.W.2d 880 (1977).

Ohio—Village of Covington v. Lyle, 69 Ohio St. 2d 659, 23 Ohio Op. 3d 535, 433 N.E.2d 597 (1982).

5 Ind.—State v. Schelton, 205 Ind. 416, 186 N.E. 772 (1933).
N.C.—Ex parte Steele, 220 N.C. 685, 18 S.E.2d 132 (1942).
Okla.—Ex parte Lewis, 47 Okla. Crim. 72, 288 P. 354 (1930).

6 Ohio—Nebgen v. State, 47 Ohio App. 431, 16 Ohio L. Abs. 126, 192 N.E. 130 (6th Dist. Lucas County 1933).
W. Va.—State v. Simmons, 117 W. Va. 326, 185 S.E. 417 (1936).

7 Ark.—Hill v. State, 174 Ark. 886, 298 S.W. 321 (1927).
Va.—Brooks v. Town of Potomac, 149 Va. 427, 141 S.E. 249 (1928).

8 U.S.—Tumey v. State of Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio L. Abs. 159, 5 Ohio L. Abs. 185, 50 A.L.R. 1243 (1927).

9 U.S.—Dugan v. State of Ohio, 277 U.S. 61, 48 S. Ct. 439, 72 L. Ed. 784 (1928).
Ohio—State ex rel. Brockman v. Proctor, 35 Ohio St. 2d 79, 64 Ohio Op. 2d 50, 298 N.E.2d 532 (1973).

10 Tex.—Joseph v. Travis County, 8 S.W.2d 741 (Tex. Civ. App. Austin 1928), aff'd, 16 S.W.2d 283 (Tex. Comm'n App. 1929).

11 U.S.—Tumey v. State of Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio L. Abs. 159, 5 Ohio L. Abs. 185, 50 A.L.R. 1243 (1927).
Ga.—Smith v. State, 74 Ga. App. 777, 41 S.E.2d 541 (1947).

12 N.Y.—Sharkey v. Thurston, 268 N.Y. 123, 196 N.E. 766 (1935).

13 U.S.—Pales De Mendez v. Aponte, 294 F. Supp. 311 (D.P.R. 1969).
Okla.—Tweedy v. Oklahoma Bar Ass'n, 1981 OK 12, 624 P.2d 1049 (Okla. 1981).
Pa.—Berman v. Com., 37 Pa. Commw. 559, 391 A.2d 715 (1978).

14 Okla.—Ex parte Roberts, 57 Okla. Crim. 85, 45 P.2d 1112 (1935).

15 Ohio—Moore v. State, 118 Ohio St. 487, 6 Ohio L. Abs. 326, 161 N.E. 532 (1928).

16 **Preliminary examination and jury trial**
The defendant was not denied procedural due process by the fact that the same judge presided at the proceedings leading to the issuance of a criminal warrant charging the defendant with a burglary violation, at a preliminary examination resulting in the defendant being bound over for trial and at a jury trial in which the defendant was convicted.
Wis.—State v. Knoblock, 44 Wis. 2d 130, 170 N.W.2d 781 (1969).
Motion for correction of sentence and sentencing
That the judge who entertained a motion for correction and reduction of the sentence had presided at the petitioner's sentencing did not deny due process.
U.S.—Page v. U.S., 462 F.2d 932 (3d Cir. 1972).

17 **Presentence report**
A criminal defendant was not deprived of due process by virtue of the fact that the same judge heard both of two cases against him and read his presentence report before the trial of the second case.
U.S.—U.S. v. Nunn, 435 F. Supp. 294 (N.D. Ind. 1977).

18 **Substitute judge receiving verdict of jury**
The defendant was not denied due process by not having one judge try his case, where the first judge presided over the case and heard all the evidence, and a substitute judge temporarily replaced the trial judge during jury deliberations and received the verdict of the jury.
Mo.—Medley v. State, 639 S.W.2d 401 (Mo. Ct. App. E.D. 1982).

19 U.S.—U.S. v. Mitchell, 377 F. Supp. 1312 (D.D.C. 1974), judgment aff'd, 559 F.2d 31, 1 Fed. R. Evid. Serv. 1203 (D.C. Cir. 1976).

20 U.S.—Corbett v. Bordenkircher, 615 F.2d 722 (6th Cir. 1980).
Tex.—McKnight v. State, 432 S.W.2d 69 (Tex. Crim. App. 1968).

21 Kan.—State v. Walker, 283 Kan. 587, 153 P.3d 1257 (2007).

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16C C.J.S. Constitutional Law § 1707

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Constitutional Law
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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

1. In General

§ 1707. Indigents; transcripts and financial aid

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4788, 4790, 4792

In a criminal prosecution, due process guarantees the right of an indigent defendant to reasonably fair equality with those defendants who have adequate financial means to protect their rights and, accordingly, the right to a free transcript of the trial proceeding.

An indigent defendant in a criminal proceeding is entitled to the due process guaranty of fundamental fairness.[1] If an indigent defendant is denied access to the basic tools of an adequate defense, he or she has also been denied his or her due process right to a fair trial.[2] What constitutes the basic tools or necessary services of an adequate defense, however, has not been clearly defined and may vary from case to case.[3] Due process guarantees the right of an indigent defendant to a reasonably fair equality with those defendants who have adequate financial means to protect their rights.[4] Requests by an indigent defendant for supporting services are to be measured by the requirements of due process.[5] There is no denial of due process where a request for certain material or information does not show that it is necessary in order to prepare an adequate defense.[6]

An indigent defendant has the right, under the Due Process Clause, to have a free transcript of the trial proceedings,[7] provided there is a proper showing of indigency,[8] of the specific need for the transcript,[9] and the necessary steps to protect such right are taken.[10] Due process does not entitle indigent defendants to a transcript at state expense prior to the filing of a petition for postconviction relief.[11]

The State, as a matter of due process, need not supply a complete transcript for an indigent as long as it provides those portions of the trial transcript which are relevant to the issues raised by the indigent.[12] The due process issue is raised by the absence of a perfect transcript only if the defects preclude the defendant from asserting the constitutional violation in the trial.[13] Due process is not violated where the request for the trial transcript is denied, and the defendant could have requested a partial transcript but failed to do so.[14]

The denial of a copy of the transcript is not a violation of due process as long as the defendant has reasonable access to the transcript in preparing a claim.[15] After the time for appeal has expired, there is no due process right to a free copy of one's court records in the absence of a showing of necessity or justification.[16] A delay in providing an indigent defendant with the transcripts and records of the defendant's case, although regrettable, does not constitute a denial of due process,[17] especially where the prosecution does not contribute to the delay, and there is no showing of prejudice to the defendant.[18] In many instances, and on various grounds, the request for a trial transcript by indigent defendants has been denied without violating their due process rights.[19]

CUMULATIVE SUPPLEMENT

Cases:

Criminal trial is fundamentally unfair, in violation of Due Process Clause, if state proceeds against indigent defendant without making certain that he has access to raw materials integral to building of effective defense. U.S. Const. Amend. 5. United States v. Gentry, 941 F.3d 767 (5th Cir. 2019).

[END OF SUPPLEMENT]

Footnotes

1 Wash.—In re Brown, 143 Wash. 2d 431, 21 P.3d 687 (2001).

2 Idaho—State v. Olin, 103 Idaho 391, 648 P.2d 203 (1982).
Ohio—State v. Maxwell, 139 Ohio St. 3d 12, 2014-Ohio-1019, 9 N.E.3d 930 (2014), cert. denied, 135 S. Ct. 1400 (2015).
Va.—Morva v. Com., 278 Va. 329, 683 S.E.2d 553 (2009).

3 Idaho—State v. Olin, 103 Idaho 391, 648 P.2d 203 (1982).

4 U.S.—U.S. v. Hartfield, 513 F.2d 254 (9th Cir. 1975) (abrogated on other grounds by, U.S. v. Sneezer, 900 F.2d 177 (9th Cir. 1990)).

5 Kan.—State v. Campbell, 210 Kan. 265, 500 P.2d 21 (1972).

6 N.M.—State v. Turner, 90 N.M. 79, 1976-NMCA-119, 559 P.2d 1206 (Ct. App. 1976).

7 U.S.—Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891, 55 A.L.R.2d 1055 (1956).
Due process as requiring adequate appellate review to indigent defendants, see § 1777.
Destruction of transcript

While defendant is entitled to transcript of trial or its reconstructed equivalent for appeal, there is no concomitant right to preserve trial transcript forever, long after defendant has been afforded right to appeal, and thus, destruction of transcript of defendant's state trial according to established administrative procedure some 15 years after his conviction was reviewed and affirmed on appeal did not violate due process with respect to defendant's collateral attack on conviction.

N.Y.—People v. Abbott, 113 Misc. 2d 766, 449 N.Y.S.2d 853 (Sup 1982), aff'd, 178 A.D.2d 281, 577 N.Y.S.2d 370 (1st Dep't 1991).

8 U.S.—McKee v. Page, 435 F.2d 689 (10th Cir. 1970).

Ariz.—State v. Reynolds, 108 Ariz. 541, 503 P.2d 369 (1972).

9 Md.—Brown v. State, 1 Md. App. 571, 232 A.2d 261 (1967).

Va.—Harley v. Com., 25 Va. App. 342, 488 S.E.2d 647 (1997).

10 Ala.—Mayola v. State, 344 So. 2d 818 (Ala. Crim. App. 1977).

N.C.—State v. Tripp, 52 N.C. App. 244, 278 S.E.2d 592 (1981).

11 Ohio—State v. Bird, 138 Ohio App. 3d 400, 741 N.E.2d 560 (10th Dist. Franklin County 2000).

12 Ill.—People v. Moore, 5 Ill. App. 3d 125, 283 N.E.2d 264 (1st Dist. 1972).

13 U.S.—Mitchell v. Wyrick, 536 F. Supp. 395 (E.D. Mo. 1982), judgment aff'd, 698 F.2d 940 (8th Cir. 1983).

14 Cal.—People v. Lopez, 1 Cal. App. 3d 78, 81 Cal. Rptr. 386 (5th Dist. 1969).

15 U.S.—Smith v. De Furia, 373 F. Supp. 967 (E.D. Pa. 1974).

16 Ga.—Syms v. State, 250 Ga. App. 177, 550 S.E.2d 723 (2001).

Iowa—Larson v. Bennett, 160 N.W.2d 303 (Iowa 1968).

17 Ill.—People v. Baker, 130 Ill. App. 2d 89, 264 N.E.2d 478 (1st Dist. 1970).

18 Mass.—Com. v. Fay, 14 Mass. App. Ct. 371, 439 N.E.2d 855 (1982).

19 Ala.—Mallory v. State, 55 Ala. App. 82, 313 So. 2d 203 (Crim. App. 1975), writ denied, 294 Ala. 765, 313 So. 2d 208 (1975).

Mo.—State v. Jones, 545 S.W.2d 659 (Mo. Ct. App. 1976).

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16C C.J.S. Constitutional Law § 1708

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Constitutional Law
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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

1. In General

§ 1708. Indigents; transcripts and financial aid—Expert or investigative assistance

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4789

The denial of expert assistance to a criminal defendant may violate the due process clause.

The denial of expert assistance to a criminal defendant may violate the due process clause[1] where the defendant's trial is thereby rendered fundamentally unfair.[2] However, due process does not require a state to provide expert or investigative assistance merely because an indigent defendant requests it,[3] and a requirement that an indigent defendant who seeks the appointment of an expert witness at the government's expense demonstrate that he or she will be prejudiced by the lack of expert assistance does not violate due process.[4] A request for such services should be considered in the light of all the circumstances and measured against the standard of fundamental fairness embodied in the due process clause.[5] The question for purposes of determining whether a defendant has a due process right to expert assistance at public expense must be not what field of science or expert knowledge is involved but rather how important a scientific issue is in the case and how much help a defense expert could give.[6] More specifically, in determining whether the provision of an expert witness is required, it is appropriate to consider the effect on the defendant's private interest in the accuracy of the trial if the requested service is not provided, the burden on the government's interest if the service is provided, and the probable value of the additional service and the risk of error in the

proceeding if the assistance is not provided.[7] Due process does not require the provision of expert assistance relevant to an issue that is not likely to be significant at trial.[8]

The reasonableness of a judge's denial necessarily turns on the sufficiency of the petitioner's explanation as to why the petitioner needed an expert.[9] There is no violation of due process in the refusal to provide for expert witnesses when the defendant offers little more than an undeveloped assertion that the requested assistance would be beneficial.[10] However, if expert or investigative help is necessary to the defense, due process requires that such service be provided to an indigent,[11] and a failure of the State to provide investigative assistance for indigent defendants, when needed, may result in an ineffective trial representation in violation of due process.[12] When the defendant is able to make a threshold showing to the trial court that the issue for which the defendant seeks expert assistance is likely to be a significant factor in the defense, and that the defendant will be prejudiced were the request to be denied, due process requires the appointment of an expert at state expense.[13]

Due process does not confer the right to receive all assistance that a nonindigent defendant may purchase.[14] All that is due, constitutionally, is that an indigent defendant not be denied an adequate opportunity to present claims fairly within the adversary system.[15] Also, there is no denial of due process where an indigent defendant is provided with an expert service but not with the exact service the defendant wanted.[16] Due process does not entitle an indigent defendant to the best or most expensive expert or to more than one expert if the first does not reach a conclusion favorable to the defense; a defendant who relies on public funds for expert assistance must be satisfied with a competent expert.[17]

An indigent defendant is not denied due process of law where the State does not provide sufficient funds to enable the defendant independently to investigate,[18] to procure witnesses in his or her defense,[19] or to obtain a state-administered polygraph examination.[20]

Sanity in question.

An indigent defendant must have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his or her mental condition when the defendant's sanity at the time of the offense is seriously in question.[21] Due process requires the appointment of a psychiatrist to provide technical assistance to the accused, to help evaluate the strength of the accused's defense, to offer his or her own expert diagnosis at trial if it is favorable to that defense, and to identify the weaknesses in the State's case, if any, by testifying and/or preparing counsel to cross-examine opposing experts.[22] Some courts have held that an indigent criminal defendant's constitutional right to psychiatric assistance in preparing an insanity defense is not satisfied by court appointment of a neutral psychiatrist, i.e., one whose report is available to both the defense and the prosecution.[23] Other courts have held that providing an indigent defendant with the assistance of a court-appointed psychiatrist, whose opinion and testimony is available to both sides, satisfies a defendant's due process rights.[24] According to some authorities, trial courts are not required to appoint a psychiatrist, rather than a clinical psychologist, to assist an indigent defendant.[25] According to other authorities, the State is required to provide an indigent defendant with access to the assistance of a competent psychiatrist in preparing a defense, not by some other mental health expert.[26]

Footnotes

1 Ariz.—Jones v. Sterling, 210 Ariz. 308, 110 P.3d 1271 (2005).

2 Miss.—Powers v. State, 945 So. 2d 386 (Miss. 2006).

3 Idaho—State v. Abdullah, 2015 WL 856787 (Idaho 2015).

Miss.—Fisher v. City of Eupora, 587 So. 2d 878 (Miss. 1991).
Tenn.—State v. Tyson, 603 S.W.2d 748 (Tenn. Crim. App. 1980).

4 Va.—Dowdy v. Com., 278 Va. 577, 686 S.E.2d 710 (2009).

5 Idaho—State v. Lovelace, 140 Idaho 53, 90 P.3d 278 (2003), on reh'g, 140 Idaho 73, 90 P.3d 298 (2004).

Fingerprint expert

Due process did not require that the State provide the indigent defendant in a murder prosecution with the services of a fingerprint expert where, on the facts presented, the expert's testimony would not have induced reasonable doubt in the minds of enough jurors to avoid conviction.

U.S.—Hoback v. State of Ala., 607 F.2d 680 (5th Cir. 1979).

6 Conn.—State v. Wang, 312 Conn. 222, 92 A.3d 220 (2014).

7 U.S.—Toles v. Gibson, 269 F.3d 1167 (10th Cir. 2001).
Miss.—Townsend v. State, 847 So. 2d 825 (Miss. 2003).
Ohio—State v. Brady, 119 Ohio St. 3d 375, 2008-Ohio-4493, 894 N.E.2d 671 (2008).

8 Ohio—State v. Mason, 82 Ohio St. 3d 144, 1998-Ohio-370, 694 N.E.2d 932 (1998).
Tex.—Matter of J.E.H., 972 S.W.2d 928 (Tex. App. Beaumont 1998).

9 U.S.—Conklin v. Schofield, 366 F.3d 1191 (11th Cir. 2004).

10 U.S.—Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985).
Ky.—St. Clair v. Com., 140 S.W.3d 510 (Ky. 2004), as modified, (Feb. 23, 2004).

11 U.S.—Mason v. State of Ariz., 504 F.2d 1345 (9th Cir. 1974).
Ariz.—Jacobson v. Anderson, 203 Ariz. 543, 57 P.3d 733 (Ct. App. Div. 1 2002).
Cal.—People v. San Nicolas, 34 Cal. 4th 614, 21 Cal. Rptr. 3d 612, 101 P.3d 509 (2004).
Ohio—State v. Mason, 82 Ohio St. 3d 144, 1998-Ohio-370, 694 N.E.2d 932 (1998).

12 U.S.—Mason v. State of Ariz., 504 F.2d 1345 (9th Cir. 1974).
As to effective assistance of counsel for indigents, generally, see § 1686.

13 Va.—Sanchez v. Com., 41 Va. App. 340, 585 S.E.2d 337 (2003).

14 Mich.—People v. Leonard, 224 Mich. App. 569, 569 N.W.2d 663 (1997).
Va.—Sanchez v. Com., 41 Va. App. 340, 585 S.E.2d 337 (2003).

15 Mich.—People v. Leonard, 224 Mich. App. 569, 569 N.W.2d 663 (1997).
Va.—Sanchez v. Com., 41 Va. App. 340, 585 S.E.2d 337 (2003).

16 **Medical experts**

Ala.—Clark v. State, 56 Ala. App. 67, 318 So. 2d 813 (Crim. App. 1974), writ quashed, 294 Ala. 493, 318 So. 2d 822 (1975).

17 Tex.—Ex parte Jimenez, 364 S.W.3d 866 (Tex. Crim. App. 2012), cert. denied, 133 S. Ct. 834, 184 L. Ed. 2d 651 (2013).

18 Ala.—Tillis v. State, 292 Ala. 521, 296 So. 2d 892 (1974).

19 Ala.—Tillis v. State, 292 Ala. 521, 296 So. 2d 892 (1974).
Ga.—Hughes v. State, 228 Ga. 593, 187 S.E.2d 135 (1972).
Okla.—Cox v. State, 1982 OK CR 58, 644 P.2d 1077 (Okla. Crim. App. 1982).

20 Tenn.—Nolan v. State, 568 S.W.2d 837 (Tenn. Crim. App. 1978).

21 U.S.—Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).

Heroin addiction

A state trial court's failure to provide an indigent defendant with a psychiatrist on his bare assertion that he was a heroin addict did not result in a denial of a fair trial and a violation of the defendant's due process rights because the fact of his addiction alone was not enough to make his sanity a significant factor at trial.

U.S.—Volanty v. Lynaugh, 874 F.2d 243 (5th Cir. 1989).

22 Tex.—De Freece v. State, 848 S.W.2d 150 (Tex. Crim. App. 1993).

23 U.S.—Powell v. Collins, 332 F.3d 376 (6th Cir. 2003).

24 U.S.—Granviel v. Lynaugh, 881 F.2d 185, 28 Fed. R. Evid. Serv. 1051 (5th Cir. 1989).

25 Va.—Funk v. Com., 8 Va. App. 91, 379 S.E.2d 371 (1989).

26 Ga.—Lindsey v. State, 254 Ga. 444, 330 S.E.2d 563 (1985).

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16C C.J.S. Constitutional Law § 1709

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Constitutional Law
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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

1. In General

§ 1709. New trial

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4646

In the absence of state constitutional or statutory requirements, the right to file a motion for a new trial after conviction for a criminal offense is not guaranteed under the due process clause.

In the absence of state constitutional or statutory requirements, the right to file a motion for a new trial after conviction for a criminal offense is not guaranteed under the due process clause.[1] The failure of the legislature to provide for a new trial in the case of a person convicted of crime in regular proceedings before the proper tribunal does not constitute a denial of due process of law.[2] Where new trials are provided for, the legislature may prescribe in general the time within which a motion for a new trial must be made,[3] the conditions on which it may be granted,[4] and the type of evidence to be heard or received.[5] A delay in the resolution of a defendant's motion for a new trial may raise due process concerns, but the mere passage of time is not enough to constitute a denial of due process.[6]

Decisions of the trial and appellate courts rendered in due course denying the right to a new trial do not constitute a denial of due process[7] regardless of the soundness of such decisions[8] or of their consistency with prior decisions.[9] For example, due

process does not require a new trial every time a juror has been placed in a potentially compromising situation[10] since it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.[11] However, when the prosecution has caused evidence not to be presented at trial which is material and could in any reasonable likelihood have led to a different result on retrial, due process requires a new trial.[12] Also, individual errors, insufficient in themselves to necessitate a new trial, may in the aggregate have a more debilitating effect so as to deny due process.[13]

Due process does not automatically entitle a criminal defendant to a trial de novo if the defendant was tried before a lay magistrate.[14] The trial court may refuse to permit the introduction of particular evidence on a motion for a new trial without denying due process.[15] Any private investigation by a court pending a motion for a new trial constitutes a denial to accused of the constitutional guaranty,[16] and the action of the trial court in viewing the premises where the crime was committed pending a motion by accused for a new trial constitutes a denial to accused of due process of law.[17] A defendant whose sentence is vacated is entitled to have procedural due process observed at a new trial even though substantive due process would not compel the rights to be given.[18]

Newly discovered evidence.

The protection of a defendant's due process rights does not require a new trial based on newly discovered evidence unless the evidence meets, at a minimum, the following criteria: (1) the evidence must have come to the moving party's knowledge after the trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to testimony which was introduced at the trial; and (5) it must be reasonably probable that a different result would be reached on a new trial.[19] In connection with a motion for a new trial based on the discovery of new evidence, the defendant has no due process right to insist that oral evidence be heard.[20]

Footnotes

1 Md.—Brown v. State, 237 Md. 492, 207 A.2d 103 (1965).

2 Ind.—Ward v. State, 171 Ind. 565, 86 N.E. 994 (1909).

3 U.S.—Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993).
Neb.—State v. Kelley, 198 Neb. 805, 255 N.W.2d 840 (1977).

4 U.S.—Coggins v. O'Brien, 188 F.2d 130 (1st Cir. 1951).

5 U.S.—Coggins v. O'Brien, 188 F.2d 130 (1st Cir. 1951).
Affidavits of jurors
A statute allowing the affidavits of jurors to sustain but not to impeach a verdict did not deny the defendant due process of law and was not unconstitutional.
Ga.—Shouse v. State, 231 Ga. 716, 203 S.E.2d 537 (1974).

6 Ga.—Carter v. State, 265 Ga. App. 44, 593 S.E.2d 69 (2004).

7 Ark.—Newberry v. State, 262 Ark. 334, 557 S.W.2d 864 (1977).
Mich.—People v. Podolski, 332 Mich. 508, 52 N.W.2d 201 (1952).

8 U.S.—Frank v. Mangum, 237 U.S. 309, 35 S. Ct. 582, 59 L. Ed. 969 (1915).

9 U.S.—Frank v. Mangum, 237 U.S. 309, 35 S. Ct. 582, 59 L. Ed. 969 (1915).

10 U.S.—Fullwood v. Lee, 290 F.3d 663, 59 Fed. R. Evid. Serv. 115 (4th Cir. 2002).
Cal.—In re Price, 51 Cal. 4th 547, 121 Cal. Rptr. 3d 572, 247 P.3d 929 (2011).
D.C.—Ransom v. U.S., 932 A.2d 510 (D.C. 2007).
Ohio—State v. Lang, 129 Ohio St. 3d 512, 2011-Ohio-4215, 954 N.E.2d 596 (2011).
R.I.—State v. Ramirez, 936 A.2d 1254 (R.I. 2007).

11 U.S.—Fullwood v. Lee, 290 F.3d 663, 59 Fed. R. Evid. Serv. 115 (4th Cir. 2002).

12 U.S.—Giglio v. U.S., 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); U.S. v. Mele, 462 F.2d 918 (2d Cir. 1972).

13 U.S.—U.S. v. Fernandez, 145 F.3d 59, 49 Fed. R. Evid. Serv. 731 (1st Cir. 1998).

14 S.C.—State v. Duncan, 269 S.C. 510, 238 S.E.2d 205 (1977).

15 **Testimony concerning juror conduct**

Refusal to permit defendant, on motion for new trial, to introduce testimony concerning allegedly peculiar conduct of juror during deliberations to support argument that juror was unqualified to serve could not be said to have denied defendant due process where court considered hospital records offered to show juror's disqualification, and such records indicated medical testimony of psychosomatic disturbances, carcinoma, epilepsy, and habituation to alcohol and barbiturates but also disclosed that epilepsy had been medically controlled and that habituation occurred some 16 years before jury service.

Ill.—People v. Gold, 38 Ill. 2d 510, 232 N.E.2d 702 (1967).

16 Ill.—People v. Cooper, 398 Ill. 468, 75 N.E.2d 885 (1947).

17 Ill.—People v. Cooper, 398 Ill. 468, 75 N.E.2d 885 (1947).

18 U.S.—Sellars v. Estelle, 400 F. Supp. 854 (S.D. Tex. 1975), judgment aff'd, 536 F.2d 1104 (5th Cir. 1976) and judgment aff'd, 536 F.2d 1106 (5th Cir. 1976).

19 Wis.—State v. Avery, 213 Wis. 2d 228, 570 N.W.2d 573 (Ct. App. 1997) (holding modified on other grounds by, State v. Armstrong, 2005 WI 119, 283 Wis. 2d 639, 700 N.W.2d 98 (2005)).

20 Mass.—Com. v. Jones, 432 Mass. 623, 737 N.E.2d 1247 (2000).

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

2. Trial by Jury

a. Right to Jury Trial

§ 1710. Right to jury trial, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4752

The right to a trial by jury provided in the federal courts by virtue of the Sixth Amendment is applicable to the states by reason of the Due Process Clause of the Fourteenth Amendment.

The right to a trial by jury is an essential element of the defendant's right to due process,[1] and the right is sensitive to any infringement or impairment.[2] With respect to the right to a trial by jury, the right provided in the federal courts by virtue of the Sixth Amendment is applicable to the states by reason of the Due Process Clause of the Fourteenth Amendment.[3]

A waiver of a trial by jury does not necessarily deny due process of the law.[4] While it has been held that the failure of the trial court to comply with statutes regarding the manner in which a waiver of a jury trial should be made does not ipso facto amount to a failure to observe the constitutional requirements of due process,[5] the waiver must be made voluntarily and intelligently.[6] The failure to adhere to statutes requiring that a waiver of a jury trial be in writing constitutes a denial of due process.[7] The people may refuse to consent to the defendant's request to waive a jury trial so long as that refusal comports with a defendant's

due process rights.[8] Where the prosecution objects to the defendant's waiver of trial by jury, and the defendant contends that trial by jury would result in a due process violation, the decision as to waiver then rests with the trial court.[9]

An article of a state constitution providing that, in a trial of criminal cases, the jury is the judge of law, as well as of facts, does not violate the rights to due process.[10] However, it has been held that conducting a criminal trial before a court consisting of a majority of lay judges authorized to adjudicate matters of law as well as of fact constitutes a denial of due process.[11] The same jury may determine both the competency and guilt of the defendant,[12] and the same jury may be used in both the guilt and penalty phases of a trial.[13]

Footnotes

1 U.S.—Barker v. Yukins, 199 F.3d 867, 1999 FED App. 0416P (6th Cir. 1999); Scruggs v. Williams, 903 F.2d 1430 (11th Cir. 1990).

Issues of fact

The defendant has a due process right to have issues of fact decided by a jury.

Conn.—State v. Hersey, 78 Conn. App. 141, 826 A.2d 1183 (2003).

Right established under state law

Where a right to trial by jury has been established under state law, the State cannot deny a particular accused that right without violating even minimal standards of the Due Process Clause.

Ark.—Klimas v. Mabry, 599 F.2d 842 (8th Cir. 1979), cert. granted, judgment rev'd on other grounds, 448 U.S. 444, 100 S. Ct. 2755, 65 L. Ed. 2d 897 (1980).

2 Vt.—State v. Ovitt, 126 Vt. 320, 229 A.2d 237 (1967).

Congressional enactment

Congressional enactments which may be fully within the grant of legislative authority contained in the Commerce Clause may nonetheless be invalid because found to offend the right to trial by jury.

U.S.—National League of Cities v. Usery, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976) (overruled on other grounds by, Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985)).

3 U.S.—Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976).

Conn.—State v. Goffe, 41 Conn. App. 454, 676 A.2d 1377 (1996).

Haw.—State v. Basabe, 105 Haw. 342, 97 P.3d 418 (Ct. App. 2004).

Neb.—State v. Lafler, 224 Neb. 613, 399 N.W.2d 808 (1987).

Two-tier system

The state's two-tier court system, under which a person accused of a certain crime is tried in the first instance in a lower tier, where no trial by jury is available, and is thereafter entitled to a trial de novo by jury in the second tier, does not deprive accused of Fourteenth Amendment rights to jury trial.

U.S.—Ludwig v. Massachusetts, 427 U.S. 618, 96 S. Ct. 2781, 49 L. Ed. 2d 732 (1976).

Mass.—Whitmarsh v. Com., 366 Mass. 212, 316 N.E.2d 610 (1974).

4 U.S.—Ex parte Whistler, 65 F. Supp. 40 (E.D. Wis. 1945).

Pa.—Com. v. Petrillo, 340 Pa. 33, 16 A.2d 50 (1940).

Waiver by plea of guilty

(1) Ordinarily, waiver of right to a jury trial by plea of guilty sufficiently appears where recitals in record show that accused was duly informed and admonished by court of consequences of such plea, but where defendant does not understand English language, due process requires further showing that accused comprehended meaning and effect of plea.

Ill.—People v. Vitale, 3 Ill. 2d 99, 119 N.E.2d 784 (1954).

(2) Statutes which provide death penalty on conviction for rape unless jury recommends life imprisonment and that defendant may tender plea of guilty which on acceptance shall have effect of verdict of guilty with recommendation that life imprisonment be imposed did not deprive defendant of due process by placing impermissible burden upon defendant's right to plead not guilty and to demand jury trial.

N.C.—State v. Peele, 274 N.C. 106, 161 S.E.2d 568 (1968).

5 Fla.—Sneed v. Mayo, 69 So. 2d 653 (Fla. 1954).

6 Md.—Epps v. State, 52 Md. App. 308, 450 A.2d 913 (1982).
Ohio—State v. Kristanoff, 32 Ohio App. 2d 218, 61 Ohio Op. 2d 222, 289 N.E.2d 402 (1st Dist. Hamilton County 1972).
Wyo.—Taylor v. State, 612 P.2d 851 (Wyo. 1980).

7 Wash.—State v. Wicke, 19 Wash. App. 206, 574 P.2d 407 (Div. 3 1978), judgment aff'd, 91 Wash. 2d 638, 591 P.2d 452 (1979).

8 Colo.—People v. District Court, City and County of Denver, 953 P.2d 184 (Colo. 1998).

9 Colo.—People v. District Court of Colorado's Seventeenth Judicial Dist., 843 P.2d 6 (Colo. 1992).

10 U.S.—Wyley v. Warden, Md. Penitentiary, 372 F.2d 742 (4th Cir. 1967).
Md.—Bremer v. State, 18 Md. App. 291, 307 A.2d 503 (1973).

11 Vt.—State v. Dunkerley, 134 Vt. 523, 365 A.2d 131 (1976).

12 U.S.—Blankenship v. Estelle, 545 F.2d 510 (5th Cir. 1977).
Tex.—Boss v. State, 489 S.W.2d 580 (Tex. Crim. App. 1972).

13 Cal.—People v. Washington, 71 Cal. 2d 1061, 80 Cal. Rptr. 567, 458 P.2d 479 (1969) (abrogated on other grounds by, People v. Green, 27 Cal. 3d 1, 164 Cal. Rptr. 1, 609 P.2d 468 (1980)).

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

2. Trial by Jury

a. Right to Jury Trial

§ 1711. Nature of crime as affecting right

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4752

The right to a jury trial applies only to serious crimes.

The right to a jury trial applies only to serious crimes.[1] Petty crimes or offenses which are not subject to the Sixth Amendment jury trial provisions in federal cases should not be subject to the Fourteenth Amendment jury trial requirement as applied to the states.[2] Whether an offense is petty so that a state may try it without a jury, the definitional task necessarily falls on the courts, which must either pass upon the validity of the legislative attempts to identify those petty offenses which are exempt from jury trial, or, where the legislature has not addressed itself to the problem, themselves face the question in the first instance.[3]

In any event, the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not so as to subject the trial of a state criminal case to the mandates of the Sixth Amendment jury trial provision.[4] In determining whether the length of an authorized prison term or seriousness of other punishment is enough in itself to require a state to grant

a jury trial, objective criteria are considered.[5] Generally, where a crime carries a possible penalty exceeding six months, a jury trial is required.[6]

Footnotes

1 U.S.—Ballew v. Georgia, 435 U.S. 223, 98 S. Ct. 1029, 55 L. Ed. 2d 234 (1978).
Juvenile proceedings
Due process did not require a jury trial in a juvenile court proceeding based on a charge of conduct which, if committed by an adult, would be criminal.
Or.—State v. Oman, 254 Or. 59, 457 P.2d 496 (1969).
Traffic offense
A misdemeanor traffic offense of fleeing or attempting to elude a police officer is not raised to the category of "serious crime" in the frame of reference of the constitutional right to a jury trial because of the mandatory revocation of a violator's operator's license on final conviction.
Md.—Smith v. State, 17 Md. App. 217, 301 A.2d 54 (1973).

2 U.S.—Duncan v. State of La., 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).
Neb.—State v. Harker, 8 Neb. App. 663, 600 N.W.2d 488 (1999).
Tex.—Chaouachi v. State, 870 S.W.2d 88 (Tex. App. San Antonio 1993).

3 U.S.—Duncan v. State of La., 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).
Alaska—Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970).
N.Y.—People v. Moses, 57 Misc. 2d 960, 294 N.Y.S.2d 12 (N.Y. City Crim. Ct. 1968).

4 U.S.—Duncan v. State of La., 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).
N.Y.—People v. Moses, 57 Misc. 2d 960, 294 N.Y.S.2d 12 (N.Y. City Crim. Ct. 1968).

5 U.S.—Duncan v. State of La., 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

6 U.S.—Ballew v. Georgia, 435 U.S. 223, 98 S. Ct. 1029, 55 L. Ed. 2d 234 (1978); Duncan v. State of La., 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).
Neb.—State v. Young, 194 Neb. 544, 234 N.W.2d 196 (1975).
Municipal ordinances
There was no right to a jury trial under the Fourteenth Amendment on a charge of violating a municipal ordinance punishable by fine or imprisonment up to six months or both.
Fla.—City of Tampa v. Ippolito, 360 So. 2d 1316 (Fla. 2d DCA 1978).

16C C.J.S. Constitutional Law § 1712

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

2. Trial by Jury

b. Composition and Selection of Jury

§ 1712. General due process requirements regarding composition and selection of jury

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4754, 4756

Due process requires that the accused be tried by a jury that represents a fair cross section of the community.

Due process does not guarantee the accused a randomly selected jury[1] or a jury of any particular composition.[2] However, due process may be offended if the jury panel is selected in an arbitrary and discriminatory manner.[3] Due process requires a jury selected by processes and procedures that represent a fair cross section of the particular community.[4] Underrepresentation of a cognizable group on a jury encroaches on an accused's right to an impartial jury.[5] Thus, due process principles, as applied to jury selection, protects against the arbitrary, discriminatory, and systematic exclusion of particular groups or classes of persons from serving on juries because of race, creed, national origin, or other condition.[6]

It has been held that the right to a trial by a jury selected from residents of the locality wherein the crime was committed is guaranteed by the due process clause.[7] Because this right is said to be fundamental in character, it is the duty of the court to so

advise the accused, and the failure to do so is a denial of due process.[8] However, the jury may be selected from another locality if a fair and impartial jury cannot be provided[9] or if there are other sufficiently compelling reasons.[10]

A claim of denial of the due process right requires a showing that the selection process tended to exclude or underrepresent some discernible class of persons and consequently to defeat a fair possibility for obtaining a truly representative cross section of the community.[11] Due process is not denied where there is nothing to indicate that a fair cross section of the community is not represented or that there was a systematic and intentional exclusion of a particular cognizable group of persons.[12]

An accused must be afforded the opportunity to present relevant and material factual data to establish prima facie grounds to support a challenge to the jury selection procedure.[13] A heavy burden of proof is placed upon an accused to show that the selection procedure violated due process.[14] To make out a prima facie claim that the composition of a jury violated a defendant's due process rights, the defendant has the burden of showing that the process used to select the jury pool systematically excluded a substantial and identifiable segment of the community.[15] The complaining party does not have to be a member of the particular group that is alleged to have been excluded from representation on a jury panel,[16] nor must the party establish that he or she was prejudiced by the exclusion.[17] However, a proportionally represented jury is not constitutionally mandated,[18] and any effort to create one is impermissible.[19]

Fundamental fairness requires that official information concerning prospective jurors utilized by the State in the jury selection be reasonably available to the defendant.[20]

Number of jurors.

Due process does not require a jury of 12 persons in a criminal proceeding;[21] rather, the minimum number of jurors required to satisfy due process requirements is six.[22]

Footnotes

1 U.S.—U.S. v. Kennedy, 548 F.2d 608 (5th Cir. 1977) (disapproved of on other grounds by, U.S. v. Singleterry, 683 F.2d 122 (5th Cir. 1982)).

2 Minn.—State v. Shoen, 578 N.W.2d 708 (Minn. 1998).
Filial relations
Having a father and son on the same jury did not so endanger the accused's right to a fair trial as to deny him fundamental fairness required by due process.
La.—State v. Redfud, 325 So. 2d 595 (La. 1976).

3 Tex.—Aldrich v. State, 928 S.W.2d 558 (Tex. Crim. App. 1996).

4 U.S.—Prince v. Parke, 907 F. Supp. 1243 (N.D. Ind. 1995).

5 Idaho—State v. Paz, 118 Idaho 542, 798 P.2d 1 (1990) (overruled on other grounds by, State v. Card, 121 Idaho 425, 825 P.2d 1081 (1991)).

6 U.S.—U.S. v. Hanson, 472 F. Supp. 1049 (D. Minn. 1979), aff'd, 618 F.2d 1261, 5 Fed. R. Evid. Serv. 973 (8th Cir. 1980).
Ind.—Brewer v. State, 253 Ind. 154, 252 N.E.2d 429 (1969).
La.—State v. Roy, 496 So. 2d 583 (La. Ct. App. 1st Cir. 1986), writ denied, 501 So. 2d 228 (La. 1987).
Wage earners
The systematic exclusion of wage earners from service on grand and petit juries violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

U.S.—Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966); Adams v. Thompson, 313 F. Supp. 265 (E.D. Ark. 1970).

7 Cal.—People v. Remiro, 89 Cal. App. 3d 809, 153 Cal. Rptr. 89, 2 A.L.R.4th 1135 (3d Dist. 1979).

8 S.D.—State v. Sutton, 317 N.W.2d 414 (S.D. 1982).

9 U.S.—State of Md. v. Brown, 295 F. Supp. 63 (D. Md. 1969).

W. Va.—State ex rel. Cosner v. See, 129 W. Va. 722, 42 S.E.2d 31 (1947).

10 U.S.—State of Md. v. Brown, 295 F. Supp. 63 (D. Md. 1969).

11 U.S.—U.S. v. Kennedy, 548 F.2d 608 (5th Cir. 1977) (disapproved of on other grounds by, U.S. v. Singleterry, 683 F.2d 122 (5th Cir. 1982)).

Conn.—State v. Nims, 180 Conn. 589, 430 A.2d 1306 (1980).

Colo.—People v. Moody, 630 P.2d 74 (Colo. 1981).

12 Alaska—Green v. State, 462 P.2d 994 (Alaska 1969).

13 Md.—Hicks v. State, 9 Md. App. 25, 262 A.2d 66 (1970).

14 U.S.—U.S. v. Newman, 549 F.2d 240 (2d Cir. 1977).

15 U.S.—Ballard v. Walker, 772 F. Supp. 1335 (E.D. N.Y. 1991).

16 U.S.—Bokulich v. Jury Commission of Greene County, Ala., 298 F. Supp. 181 (N.D. Ala. 1968), judgment aff'd in part, 394 U.S. 97, 89 S. Ct. 767, 22 L. Ed. 2d 109 (1969) and judgment aff'd, 396 U.S. 320, 90 S. Ct. 518, 24 L. Ed. 2d 549 (1970).

Alaska—Alvarado v. State, 486 P.2d 891 (Alaska 1971).

17 Alaska—Alvarado v. State, 486 P.2d 891 (Alaska 1971).

Tenn.—Holiday v. State, 512 S.W.2d 953 (Tenn. Crim. App. 1972).

18 Colo.—People v. Moody, 630 P.2d 74 (Colo. 1981).

Conn.—State v. Nims, 180 Conn. 589, 430 A.2d 1306 (1980).

19 Conn.—State v. Nims, 180 Conn. 589, 430 A.2d 1306 (1980).

Quota system

The manner in which jury panels are presently selected and constituted, which includes the employment of a quota system to either exclude or include a certain fixed percentage of qualified black citizens who are registered voters, is violative of due process.

Fla.—State v. Silva, 259 So. 2d 153 (Fla. 1972).

20 N.H.—State v. Goodale, 144 N.H. 224, 740 A.2d 1026 (1999).

21 U.S.—Williams v. Florida, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970).

Waiver

An attorney's waiver of a 12-person jury, with the defendant's silent presence, did not deprive the petitioner of due process.

U.S.—Cooks v. Spalding, 660 F.2d 738 (9th Cir. 1981).

22 U.S.—Ballew v. Georgia, 435 U.S. 223, 98 S. Ct. 1029, 55 L. Ed. 2d 234 (1978).

Ga.—Ballew v. State, 145 Ga. App. 829, 245 S.E.2d 169 (1978).

Ohio—State ex rel. City of Columbus v. Boyland, 58 Ohio St. 2d 490, 12 Ohio Op. 3d 401, 391 N.E.2d 324 (1979).

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Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

2. Trial by Jury

b. Composition and Selection of Jury

§ 1713. Impartial jurors

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4754

It is a basic requirement of due process that an accused who has requested a jury trial be tried by a panel of impartial and indifferent jurors.

It is a basic requirement of due process that an accused who has requested a jury trial be tried by a panel of impartial jurors.[1] The right to an impartial trial is so essential that the trial judge must be assiduous in insuring that it has not been abridged,[2] and when there is substantial reason to fear that prejudice has occurred, the jury must be questioned.[3] It is not required that jurors be totally ignorant of the facts and issues involved,[4] and it is not necessary that jurors be without an impression, notion, or opinion about the accused or the case.[5] Nevertheless, a verdict must be based exclusively upon evidence presented in court and not on outside sources.[6] Due process means a jury capable and willing to decide the case solely on the evidence before it.[7]

The State also enjoys the right to an impartial jury, free from bias for accused and against prosecution.[8]

CUMULATIVE SUPPLEMENT

Cases:

Juror's statement, that she was uncomfortable going out of the courthouse, to other jurors before juror was excused from jury service did not create implied juror bias against defendant, and thus did not violate defendant's right to trial by impartial jury in conspiracy to commit healthcare fraud prosecution; District Court examined each juror under oath and gave counsel the opportunity to question each juror, other jurors believed that juror was paranoid, and other jurors did not actually believe that defendant or anyone intimidated juror. U.S. Const. Amend. 6; 18 U.S.C.A. § 1349. United States v. Diaz, 941 F.3d 729 (5th Cir. 2019).

To be rehabilitated after unequivocal demonstration of bias, in general, a juror should, in their own words, clarify or modify declaration of bias in a fashion which demonstrates that any bias can be set aside. State v. Carroll, 456 P.3d 502 (Haw. 2020), as corrected, (Jan. 27, 2020).

A trial court's failure to remove a biased juror from a jury panel, as required by statute, does not violate a criminal defendant's right to a trial by an impartial jury if the defendant removes the juror with a peremptory strike. W. Va. Code Ann. § 62-3-3. State v. Benny W., 837 S.E.2d 679 (W. Va. 2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Ristaino v. Ross, 424 U.S. 589, 96 S. Ct. 1017, 47 L. Ed. 2d 258 (1976).
Cal.—In re Price, 51 Cal. 4th 547, 121 Cal. Rptr. 3d 572, 247 P.3d 929 (2011).
Colo.—Bloom v. People, 185 P.3d 797 (Colo. 2008).
Conn.—State v. Flowers, 85 Conn. App. 681, 858 A.2d 827 (2004), judgment rev'd on other grounds, 278 Conn. 533, 898 A.2d 789 (2006).
D.C.—Hinton v. U.S., 979 A.2d 663 (D.C. 2009).
Wis.—State v. Smith, 2006 WI 74, 291 Wis. 2d 569, 716 N.W.2d 482 (2006).
Due process requirement of fair and impartial trial free from bias, outside influence, and prejudicial publicity, see §§ 1703, 1704.
Impartial and indifferent
Mo.—State v. Ess, 453 S.W.3d 196 (Mo. 2015), reh'g overruled, (Feb. 24, 2015).
Racial prejudice
U.S.—Pamplin v. Mason, 364 F.2d 1 (5th Cir. 1966).

2 U.S.—Aston v. Warden, Powhatan Correctional Center, 574 F.2d 1169 (4th Cir. 1978).
Age difference
The fact that the defendant was 32 years of age on the date of the trial and the average age of the jury panel selected to try the defendant was 47 years of age did not establish that the defendant was denied due process of law and a right to be tried by an impartial jury.
Idaho—State v. Pontier, 95 Idaho 707, 518 P.2d 969 (1974).

3 U.S.—Aston v. Warden, Powhatan Correctional Center, 574 F.2d 1169 (4th Cir. 1978).
Haw.—State v. Altergott, 57 Haw. 492, 559 P.2d 728 (1977).
As to voir dire of jurors, generally, see § 1717.

4 Tex.—Russell v. State, 146 S.W.3d 705 (Tex. App. Texarkana 2004).

5 U.S.—Calley v. Callaway, 382 F. Supp. 650 (M.D. Ga. 1974), order rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975).
Mich.—People v. Jenkins, 10 Mich. App. 257, 159 N.W.2d 225 (1968).

Extensive publicity

The jury, which included eight persons who had expressed, on voir dire, their opinion as to the defendant's guilt of a crime which had had extensive newspaper, radio, and television coverage preceding the trial, did not meet the constitutional standards of impartiality.

U.S.—Irvin v. Dowd, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961).

6 U.S.—Oswald v. Bertrand, 374 F.3d 475 (7th Cir. 2004).

Mich.—People v. Jenkins, 10 Mich. App. 257, 159 N.W.2d 225 (1968).

7 Ohio—State v. Adams, 103 Ohio St. 3d 508, 2004-Ohio-5845, 817 N.E.2d 29 (2004).

Wyo.—Simmons v. State, 2003 WY 84, 72 P.3d 803 (Wyo. 2003).

8 U.S.—Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978) (rejected on other grounds by, Grigsby v. Mabry, 483 F. Supp. 1372 (E.D. Ark. 1980)) and (disapproved of on other grounds by, Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983)).

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16C C.J.S. Constitutional Law § 1714

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

2. Trial by Jury

b. Composition and Selection of Jury

§ 1714. Exemptions of particular groups from jury service

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4756

Statutory exemptions of particular groups or classes from jury service is valid if there are reasonable grounds for the legislature to believe that the general welfare will be better served by not subjecting persons of those groups to jury service.

Absent discrimination by race or other identifiable group or class, a state may prescribe such qualifications for jurors as it deems proper.[1] Statutory exemptions of particular groups or classes from jury service is valid if there are reasonable grounds for the legislature to believe that the general welfare will be better served by not subjecting persons of those groups to jury service.[2] Thus, various statutes which exempt or disqualify particular groups or classes of people from serving on juries are not a denial of due process.[3] This includes statutes disqualifying people with certain handicaps,[4] statutes disqualifying persons not literate in the English language,[5] statutes excluding some individuals engaged in the movement of interstate commerce,[6] and statutes excluding members of certain occupations and professions.[7] Moreover, jury selection procedures which impose

age[8] or residency[9] requirements for jurors, or which restrict the selection of jurors to registered voters or electors of a particular locality,[10] or which select jurors from persons listed on tax records and schedules,[11] do not deny due process.

Footnotes

1 N.C.—State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969).

2 N.C.—State v. Knight, 269 N.C. 100, 152 S.E.2d 179 (1967).

3 Ga.—Morris v. State, 228 Ga. 39, 184 S.E.2d 82 (1971).

People charged with crimes

The portion of a jury selection plan which barred from jury service any person who had a charge pending against the person for the commission of a crime punishable by imprisonment for more than one year did not constitute a denial of due process.

U.S.—U.S. v. Lewis, 472 F.2d 252 (3d Cir. 1973).

4 **Hearing or sight impairment**

The Due Process Clause of the Fourteenth Amendment was not violated by a statute disqualifying persons whose senses of hearing or seeing are substantially impaired from service on grand or petit juries.

U.S.—Eckstein v. Kirby, 452 F. Supp. 1235 (E.D. Ark. 1978).

5 Ariz.—State v. Cordero, 174 Ariz. 556, 851 P.2d 855 (Ct. App. Div. 2 1992).

Cal.—People v. Eubanks, 53 Cal. 4th 110, 134 Cal. Rptr. 3d 795, 266 P.3d 301 (2011).

6 U.S.—U.S. v. Computer Sciences Corp., 511 F. Supp. 1125 (E.D. Va. 1981), decision rev'd on other grounds, 689 F.2d 1181, 68 A.L.R. Fed. 783 (4th Cir. 1982) (overruled on other grounds by, Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990)).

7 U.S.—U.S. v. Computer Sciences Corp., 511 F. Supp. 1125 (E.D. Va. 1981), decision rev'd on other grounds, 689 F.2d 1181, 68 A.L.R. Fed. 783 (4th Cir. 1982) (overruled on other grounds by, Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990)).

Mo.—Hemphill v. State, 566 S.W.2d 200 (Mo. 1978).

8 U.S.—U.S. v. Olson, 473 F.2d 686 (8th Cir. 1973).

Utah—State v. Pierren, 583 P.2d 69 (Utah 1978).

Citizens

(1) States may restrict the selection of jurors to citizens who meet specific age qualifications without thereby violating the Fifth and Sixth Amendments.

U.S.—Davis v. Greer, 675 F.2d 141 (7th Cir. 1982).

(2) The inclusion of citizens, who were 65 years of age and older and who had previously been exempted, in a county's petit jury pool did not deny the accused due process.

Fla.—Rojas v. State, 296 So. 2d 627 (Fla. 3d DCA 1974).

9 U.S.—U.S. v. Ross, 468 F.2d 1213 (9th Cir. 1972).

Iowa—State v. Kappos, 189 N.W.2d 563 (Iowa 1971).

10 U.S.—U.S. v. Biaggi, 909 F.2d 662, 30 Fed. R. Evid. Serv. 673 (2d Cir. 1990).

Tex.—Chandler v. State, 744 S.W.2d 341 (Tex. App. Austin 1988).

11 Ind.—Purcell v. State, 406 N.E.2d 1255 (Ind. Ct. App. 1980).

Tax rolls

That persons of limited economic means were allegedly underrepresented on juries because they were not on the tax rolls from which jurors were selected did not deny due process of law.

Ga.—Massey v. Smith, 224 Ga. 721, 164 S.E.2d 786 (1968).

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

2. Trial by Jury

b. Composition and Selection of Jury

§ 1715. Exclusion from juries based on race or gender

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4756

The systematic exclusion of particular races from the composition of juries denies due process.

While the exclusion of blacks and other minority groups from juries is generally treated from the standpoint of a denial of equal protection of the laws,[1] the systematic exclusion of particular races from the composition of juries also denies due process.[2] Indeed, the exclusion of even one member from a jury panel for racial reasons denies due process in the jury selection process.[3] However, a person is not guaranteed a jury composed in part of members of his or her race, and the mere fact that the jury summoned contains no person of the same race or color as accused does not of itself show exclusion because of race or color.[4] Due process is violated only if it can be shown that members of the accused's race were systematically excluded from the jury, and a purposeful discrimination may not be assumed but must be proved.[5]

Gender.

The systematic exclusion of women from jury panels violates due process.[6] However, a state may have an important interest in assuring that those members of a family responsible for the care of children are available to do so.[7] Thus, statutes authorizing the courts to excuse women with children do not violate the Due Process Clause.[8]

CUMULATIVE SUPPLEMENT

Cases:

The removal of the only black juror from a panel is sufficient to establish prima facie discrimination under *Batson*. Cornell v. State, 139 N.E.3d 1135 (Ind. Ct. App. 2020).

[END OF SUPPLEMENT]

Footnotes

1 § 1287.

2 U.S.—Hamilton v. Watkins, 436 F.2d 1323 (5th Cir. 1970).
Pa.—Com. v. Darden, 441 Pa. 41, 271 A.2d 257 (1970).

3 Tex.—Lopez v. State, 940 S.W.2d 388 (Tex. App. Austin 1997), petition for discretionary review refused, 954 S.W.2d 774 (Tex. Crim. App. 1997).

4 U.S.—U.S. v. Hemmingson, 157 F.3d 347 (5th Cir. 1998).
Ariz.—State v. Reid, 114 Ariz. 16, 559 P.2d 136 (1976).

5 Ariz.—State v. Reid, 114 Ariz. 16, 559 P.2d 136 (1976).
Nev.—Bishop v. State, 92 Nev. 510, 554 P.2d 266 (1976).
Nondiscriminatory reasons
The Commonwealth had reasonably specific, nondiscriminatory reasons for striking three African-American potential jurors, and thus, defendant's due process and equal protection rights were not violated; two of the jurors were struck for having criminal records, and the third was struck because she went to high school with a member of defendant's defense team.
Ky.—Ball v. Com., 2007 WL 2404492 (Ky. 2007).

6 U.S.—Duren v. Missouri, 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979).
Mo.—State v. Coleman, 582 S.W.2d 335 (Mo. Ct. App. W.D. 1979).
N.Y.—People v. Moss, 80 Misc. 2d 633, 366 N.Y.S.2d 522 (Sup 1975).

7 U.S.—Duren v. Missouri, 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979).

8 U.S.—U.S. v. Computer Sciences Corp., 511 F. Supp. 1125 (E.D. Va. 1981), decision rev'd on other grounds, 689 F.2d 1181, 68 A.L.R. Fed. 783 (4th Cir. 1982) (overruled on other grounds by, Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990)).
Ga.—Willis v. State, 243 Ga. 185, 253 S.E.2d 70 (1979).

16C C.J.S. Constitutional Law § 1716

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I. Trial

2. Trial by Jury

b. Composition and Selection of Jury

§ 1716. Exclusion from jury in capital cases based on attitudes about death penalty

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4760

Although in capital cases the jury must not be selected to insure a verdict of death, due process is not denied by the exclusion of jurors who state that they would automatically vote against the imposition of the death penalty without regard to the evidence.

To achieve the constitutional imperative of impartiality, the law permits a prospective juror to be challenged for cause only if his or her views in favor of or against capital punishment would prevent or substantially impair the performance of his or her duties as a juror in accordance with the court's instructions and the juror's oath.[1] Prospective jurors may not be excluded merely because they indicate a hesitancy to impose the death penalty.[2] In a capital case, the jury must not be selected so as to insure a verdict of death.[3] Furthermore, based on the requirement of impartiality embodied in the Due Process Clause, a capital defendant may challenge for cause any prospective juror who will automatically vote for the death penalty in every case.[4] On the other hand, the principles of due process do not prohibit the State from exercising peremptory challenges against prospective jurors in a capital murder prosecution who express mild misgivings about imposing the death penalty.[5]

Due process is not denied by the exclusion of jurors who state that they would automatically vote against the imposition of the death penalty without regard to the evidence that might be developed at the trial of the case before them[6] or who state that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.[7]

A death sentence cannot be carried out if the jury was chosen by excluding veniremen for cause because they voiced general objections to the death penalty.[8] However, the conviction is not invalid,[9] for it cannot be said that a death qualified jury is more likely to convict,[10] and only the penalty of death is invalid.[11] Thus, excusing a juror for cause merely because the juror expressed objections to the imposition of the death penalty does not violate due process where the jury does not invoke the death penalty.[12]

Right to examine prospective jurors.

A capital defendant is not denied the due process right to a full and fair examination of prospective jurors as to whether they would automatically sentence him or her to death for a conviction of first-degree murder where the trial court makes careful and repeated inquiries to clarify the automatic-death-penalty question for jurors who express confusion about it; permits additional, individual voir dire by counsel on that question; and properly disqualifies any prospective jurors who would automatically impose a death sentence in the event of a conviction.[13]

Sequestered voir dire.

Notwithstanding that individual, sequestered voir dire may improve death qualification in capital cases, due process does not require such voir dire in all capital cases.[14]

CUMULATIVE SUPPLEMENT

Cases:

A prospective juror is not precluded from serving on the jury in a capital prosecution simply because he favors the death penalty; if the juror is willing to put aside his opinions and base his decisions solely upon the evidence, he may serve. State v. Johnson, 247 Ariz. 166, 447 P.3d 783 (2019).

[END OF SUPPLEMENT]

Footnotes

1 Cal.—People v. Taylor, 48 Cal. 4th 574, 108 Cal. Rptr. 3d 87, 229 P.3d 12 (2010).

2 U.S.—Witherspoon v. State of Ill., 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968).
La.—State v. Edwards, 750 So. 2d 893 (La. 1999).

3 U.S.—Witherspoon v. State of Ill., 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968).

4 U.S.—Morgan v. Illinois, 504 U.S. 719, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992).
Colo.—People v. Harlan, 8 P.3d 448 (Colo. 2000), as modified on denial of reh'g, (Sept. 11, 2000) and (overruled on other grounds by, People v. Miller, 113 P.3d 743 (Colo. 2005)).
Ind.—State v. Dye, 784 N.E.2d 469 (Ind. 2003).
Miss.—Batiste v. State, 121 So. 3d 808 (Miss. 2013), cert. denied, 134 S. Ct. 2287, 189 L. Ed. 2d 178 (2014).

5 Ill.—People v. Pitsonbarger, 205 Ill. 2d 444, 275 Ill. Dec. 838, 793 N.E.2d 609 (2002).

6 U.S.—Witherspoon v. State of Ill., 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968).
Mo.—State v. Mercer, 618 S.W.2d 1 (Mo. 1981).
Tex.—Pittman v. State, 434 S.W.2d 352 (Tex. Crim. App. 1968).

7 U.S.—Witherspoon v. State of Ill., 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968).

8 § 1742.

9 U.S.—Woodards v. Cardwell, 430 F.2d 978, 55 Ohio Op. 2d 405 (6th Cir. 1970); Cardinale v. Henderson, 316 F. Supp. 481 (E.D. La. 1970).

10 U.S.—Witherspoon v. State of Ill., 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968).
Ark.—Couch v. State, 274 Ark. 29, 621 S.W.2d 694 (1981).
Bifurcated trial
The section of a statute providing for a bifurcated trial in murder cases does not constitute a denial of due process on the basis of exclusion from sitting on the guilt phase those prospective jurors who have a conscientious opinion against imposing the death penalty.
Cal.—People v. Thomas, 65 Cal. 2d 698, 56 Cal. Rptr. 305, 423 P.2d 233 (1967).

11 § 1742.

12 Cal.—People v. Schindler, 273 Cal. App. 2d 624, 78 Cal. Rptr. 633 (2d Dist. 1969).
Tenn.—Young v. State, 3 Tenn. Crim. App. 166, 458 S.W.2d 635 (1970).

13 Okla.—Sanchez v. State, 2009 OK CR 31, 223 P.3d 980 (Okla. Crim. App. 2009).

14 Cal.—People v. Brasure, 42 Cal. 4th 1037, 71 Cal. Rptr. 3d 675, 175 P.3d 632 (2008).

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16C C.J.S. Constitutional Law § 1717

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I. Trial

2. Trial by Jury

b. Composition and Selection of Jury

§ 1717. Voir dire

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4756

Courts have great discretion in conducting voir dire, and due process is violated only by fundamentally unfair procedures.

A voir dire examination must meet the minimum standards of fairness required by the due process clause.[1] Due process requires a fair opportunity to discover existing grounds for challenge to a jury during voir dire examination, both for cause and peremptorily, but no more.[2] The court must undertake sufficient voir dire questioning to produce, in light of the factual situation involved in the particular trial, some basis for a reasonably knowledgeable exercise of the right to challenge.[3]

Trial courts are generally accorded great discretion in conducting voir dire.[4] Due process will only be violated by procedures that are fundamentally unfair[5] and that affect the defendant's right to a fair and impartial jury.[6] Due process does not mandate individual voir dire.[7] However, the decision whether to voir dire prospective jurors individually or collectively is limited by

the requirements of due process, and individual questioning may be necessary under some circumstances to ensure that all prejudice has been exposed.[8]

The right to a trial by an impartial jury is not violated when the court fails to inquire on voir dire which jurors are willing to follow the court's instructions regarding the weight of the evidence, the burden of proof, and the accused's right to remain silent.[9]

The due process clause requires that questions on voir dire be put to the jurors as to their possible racial prejudice if the possibility of racial prejudice exists.[10] However, the failure of the trial court to make such inquiry in the absence of evidence of racial overtones to the particular case does not constitute a denial of due process.[11]

Concealment by a juror during voir dire of familial relations to a victim of crime[12] or to a police officer[13] can amount to a violation of due process of law.

Capital cases.

A capital defendant's right to voir dire is rooted in the due process clause,[14] and a capital defendant's right to an impartial jury for sentencing includes the right to adequate voir dire to permit identification of unqualified jurors.[15]

CUMULATIVE SUPPLEMENT

Cases:

In cases involving interracial rape, because of the substantial risk that extraneous issues will influence the jury, individual questioning with respect to racial prejudice, on request, is mandatory. Mass. Gen. Laws Ann. ch. 234A, § 67A. Commonwealth v. Billingslea, 143 N.E.3d 425 (Mass. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Conn.—State v. Smith, 222 Conn. 1, 608 A.2d 63 (1992).

2 Ind.—Johnson v. State, 272 Ind. 427, 399 N.E.2d 360 (1980).

3 U.S.—Johnson v. Armontrout, 961 F.2d 748 (8th Cir. 1992).

4 U.S.—Boyd v. LeFevre, 519 F. Supp. 629 (E.D. N.Y. 1981).
Ky.—Sherroan v. Com., 142 S.W.3d 7 (Ky. 2004) (holding modified on other grounds by, Elery v. Com., 368 S.W.3d 78 (Ky. 2012)).
Pro se defendant
The trial judge's decision to conduct voir dire himself did not deprive a pro se defendant of the right of due process.
Pa.—Com. v. Abu-Jamal, 521 Pa. 188, 555 A.2d 846 (1989).
Pretrial publicity
Trial judge's refusal to question prospective jurors about specific contents of news reports to which they had been exposed did not violate defendant's right to due process, where court asked entire venire of jurors four separate questions about effect on them of pretrial publicity or information about case obtained by other means, and court then conducted further voir dire in panels of four, and each time individual juror indicated

that he or she acquired knowledge of facts from outside sources, juror was asked whether he or she had formed an opinion.

U.S.—Mu'Min v. Virginia, 500 U.S. 415, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991).

5 U.S.—Boyd v. LeFevre, 519 F. Supp. 629 (E.D. N.Y. 1981).

Conn.—State v. Marsh, 168 Conn. 520, 362 A.2d 523 (1975).

General or specific questions

Whether a general question will adequately expose possible bias and prejudice, or whether specific questions are mandated, depends on whether the demands of due process could be satisfied by a more generalized duty through inquiry into the impartiality of the venirepersons.

U.S.—U.S. v. Furey, 491 F. Supp. 1048 (E.D. Pa. 1980), aff'd, 636 F.2d 1211 (3d Cir. 1980).

6 Cal.—People v. Yeoman, 31 Cal. 4th 93, 2 Cal. Rptr. 3d 186, 72 P.3d 1166 (2003).

7 Ill.—People v. Diggs, 243 Ill. App. 3d 93, 183 Ill. Dec. 826, 612 N.E.2d 83 (1st Dist. 1993).

Mo.—State v. Weaver, 912 S.W.2d 499 (Mo. 1995).

8 Ala.—Boyd v. State, 715 So. 2d 825 (Ala. Crim. App. 1997), judgment aff'd, 715 So. 2d 852 (Ala. 1998) and (disapproved of on other grounds by, Ex parte Bryant, 951 So. 2d 724 (Ala. 2002)).

9 U.S.—Jacobs v. Redman, 616 F.2d 1251 (3d Cir. 1980).

10 Ill.—People v. Diggs, 243 Ill. App. 3d 93, 183 Ill. Dec. 826, 612 N.E.2d 83 (1st Dist. 1993).

Md.—Hernandez v. State, 357 Md. 204, 742 A.2d 952 (1999).

11 Mass.—Com. v. Ross, 363 Mass. 665, 296 N.E.2d 810 (1973).

N.J.—State v. Long, 137 N.J. Super. 124, 348 A.2d 202 (App. Div. 1975).

12 U.S.—U.S. v. Vento, 533 F.2d 838 (3d Cir. 1976).

Due process not violated

Even if one juror, who stated on voir dire that neither she nor any member of family had ever been victim of crime, later told other jurors that mother had been victim of crime, circumstances did not approach level of fundamental unfairness constituting denial of due process where event in question was remotely connected in time to instant trial and had no relation to nature of the crimes of which defendants were convicted.

U.S.—U.S. v. Lowell, 490 F. Supp. 897 (D.N.J. 1980), judgment aff'd, 649 F.2d 950, 8 Fed. R. Evid. Serv. 1 (3d Cir. 1981).

13 U.S.—U.S. v. Vento, 533 F.2d 838 (3d Cir. 1976).

14 S.C.—State v. Wise, 359 S.C. 14, 596 S.E.2d 475 (2004).

15 Ill.—People v. Buss, 187 Ill. 2d 144, 240 Ill. Dec. 520, 718 N.E.2d 1 (1999).

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16C C.J.S. Constitutional Law § 1718

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Constitutional Law
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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

2. Trial by Jury

b. Composition and Selection of Jury

§ 1718. Peremptory challenges

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4756

The action of a prosecutor in peremptorily challenging all jurors of a particular race does not necessarily deny due process.

The Due Process Clause prohibits the use of peremptory strikes on the basis of race.[1] A prosecutor may not intentionally and systematically, through the use of peremptory challenges, bar persons of a particular race from serving on juries.[2] However, the action of a prosecutor in peremptorily challenging all jurors of a particular race does not necessarily deny due process,[3] in the absence of a showing that the exclusion was in fact systematic.[4] The State's use of peremptory strikes against potential jurors who have family members who have been convicted of crimes is completely acceptable as a race-neutral reason and does not violate due process requirements.[5]

The failure of a trial court in a first-degree murder trial to afford a defendant the statutory right to a prescribed number of peremptory challenges is a violation of the right to due process.[6] However, a trial court's failure to remove for cause a juror

who should have been removed, thus causing the defendant to use a peremptory challenge, does not violate the defendant's right to due process by arbitrarily depriving the defendant of the full complement of peremptory challenges allowed under state law.[7] A state trial judge's error in denying defendant's peremptory challenge to a prospective juror, who subsequently serves as foreperson on the jury that finds the defendant guilty, does not deprive defendant of right to a fair trial before an impartial jury under the Sixth and Fourteenth Amendments, where the trial judge's conduct reflects a good-faith, if arguably overzealous, effort to enforce the antidiscrimination requirements of *Batson,*[8] and all the seated jurors are qualified and unbiased.[9]

Where the record does not show that the trial court lacked good faith when it erroneously granted the state's reverse *Batson* challenge of defendant's and codefendant's peremptory strikes of a black prospective juror in a death-penalty case, the error does not implicate federal constitutional due process guarantees.[10]

CUMULATIVE SUPPLEMENT

Cases:

Under the three-step test for a *Batson* claim alleging the use of race-based peremptory strikes during jury selection, a defendant must first make a prima facie case that race motivated the challenged strikes, and if the defendant carries this burden, a prosecutor must provide race-neutral reasons for the challenged strikes, and finally, the trial court or reviewing court considers whether the defendant has carried his burden of proving purposeful discrimination. Ramey v. Davis, 942 F.3d 241 (5th Cir. 2019).

Former public employee failed to show that city, mayor, and board members' peremptory strike was motivated by racial discrimination, though defendants used peremptory strike on only black prospective juror; prospective juror said he would try when asked whether he could follow all instructions and be a fair and impartial juror, and juror claimed to be dissatisfied with the handling of civil case in which he had been a defendant. Landwehr v. City of Gerald, 784 Fed. Appx. 967 (8th Cir. 2019).

Unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges of prospective jurors are not of federal constitutional dimension, and so long as the jury that sits is impartial, the Sixth Amendment is not violated where a party must use a peremptory challenge to achieve that result. U.S. Const. Amend. 6. Harte v. Board of Commissioners of County of Johnson, Kansas, 940 F.3d 498 (10th Cir. 2019).

The district court did not commit *Batson* error in finding that African-American prospective juror's work with victims of crime served as a satisfactory race-neutral reason for government's peremptory challenge, since it is not unusual for prosecutors to be skeptical of potential jurors who have shown unusual sympathy for those who have had troubled lives. U.S.C.A. Const. Amend. 14. United States v. Golden, 781 Fed. Appx. 798 (10th Cir. 2019).

Fact that defendant's two murder victims were Caucasian while defendant was African-American did not support inference of discrimination on part of prosecutor in striking African-American potential jurors; prosecution presented evidence that defendant committed violent acts against four additional victims, the races of whom were unknown, no other discriminatory factors were present, and only bare majority, seven of 12, of the seated jurors were Caucasian. People v. Johnson, 8 Cal. 5th 475, 255 Cal. Rptr. 3d 393, 453 P.3d 38 (Cal. 2019).

Defense counsel's statement that she simply did not like potential juror was not a race-neutral reason for a peremptory strike, where defense counsel did not point to anything in record that supported defendant's dislike of potential juror. Risech v. State, 293 So. 3d 618 (Fla. 1st DCA 2020), review dismissed, 2020 WL 3097427 (Fla. 2020).

Minority prospective juror's having her hands full with her job and toddler and having a friend whose daughter was murdered in a case that apparently was not resolved to juror's satisfaction were facially valid race-neutral reasons for peremptory strike. State v. Ish, 461 P.3d 774 (Idaho 2020).

The job of enforcing *Batson* rests first and foremost with trial judges. State v. Ish, 461 P.3d 774 (Idaho 2020).

Trial court, when evaluating State's reverse-*Batson* challenge to defendant's use of peremptory strike to remove white prospective juror from jury pool, impermissibly shifted burden onto defense to rebut prosecutor's prima facie case, requiring vacation of defendant's convictions of attempted second-degree murder and being a felon in possession of a firearm; at step two of *Batson* analysis, trial judge indicated that reason provided by defense for striking white juror, namely, that juror had not been that talkative, was facially race-neutral because discriminatory intent was not inherent in that reason, but then trial judge went on to indicate that she was not satisfied with defendant's proffered race-neutral reasons, resulting in blurring of line between *Batson*'s second and third steps. State v. Jones, 285 So. 3d 1074 (La. 2019).

Age is a race-neutral reason for a peremptory strike of a juror. Johnson v. State, 288 So. 3d 342 (Miss. Ct. App. 2019), cert. denied, 287 So. 3d 216 (Miss. 2020).

When jurors who should have been removed for cause are not removed and must, therefore, be removed by peremptory challenge, the party wrongfully denied the challenge for cause effectively loses one of the peremptory challenges to which he is entitled by law. Mont. Code Ann. § 46-16-115(2)(j). State v. Ghostbear, 2020 MT 60, 459 P.3d 1285 (Mont. 2020).

Defense counsel's proffered race-neutral reasons for striking certain prospective juror, including that juror was too young and juror's alleged hesitation in answering a question about willingness to acquit, were pretext for discrimination based on race, in prosecution for murder in the second degree, two counts of assault in the first degree, and two counts of criminal possession of a weapon in the second degree; unchallenged jurors were equally young as challenged prospective juror. People v. Everett, 183 A.D.3d 417, 123 N.Y.S.3d 585 (1st Dep't 2020).

Defendant failed to make a prima facie showing of discrimination in support of his *Batson* challenge against prosecutor in defendant's prosecution for driving while intoxicated and speeding, where defendant relied solely on the number of peremptory challenges exercised against black prospective jurors. People v. Sylvestre, 178 A.D.3d 863, 116 N.Y.S.3d 98 (2d Dep't 2019).

People's race-neutral reason for challenging African-American juror that juror was too confused to serve as a juror was not pretextual in prosecution for criminal sale of a controlled substance and criminal possession of a controlled substance, for purposes of defendant's *Batson* challenge, even though People had challenged other African-American jurors in the previous trial on the same charges; voir dire record showed that juror was confused about the proceeding. People v. Williams, 177 A.D.3d 1178, 114 N.Y.S.3d 500 (3d Dep't 2019).

Exercising a peremptory challenge to remove a juror who does not qualify under death-qualification questioning is a presumptively invalid basis for exercising a peremptory challenge. Wash. Gen. R. 37(e). State v. Pierce, 455 P.3d 647 (Wash. 2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—U.S. v. Davis, 393 F.3d 540 (5th Cir. 2004).

A.L.R. Library

Use of peremptory challenges to exclude Caucasian persons, as a racial group, from criminal jury—post-Batson state cases, 47 A.L.R.5th 259.

Use of peremptory challenges to exclude ethnic and racial groups, other than black Americans, from criminal jury—post-Batson state cases, 20 A.L.R.5th 398.

Use of peremptory challenges to exclude ethnic and racial groups, other than black Americans, from criminal jury—post-Batson federal cases, 110 A.L.R. Fed. 690.

2 U.S.—U.S. v. Greene, 626 F.2d 75 (8th Cir. 1980).

3 U.S.—Braxton v. Estelle, 641 F.2d 392 (5th Cir. 1981); U. S. ex rel. Dixon v. Cavell, 284 F. Supp. 535 (E.D. Pa. 1968).
Pa.—Com. v. Henderson, 497 Pa. 23, 438 A.2d 951 (1981).

4 U.S.—McGinnis v. Johnson, 181 F.3d 686 (5th Cir. 1999); U.S. v. Danzey, 476 F. Supp. 1065 (E.D. N.Y. 1979), aff'd, 620 F.2d 286 (2d Cir. 1980).
Wash.—State v. Salinas, 87 Wash. 2d 112, 549 P.2d 712 (1976).

5 Miss.—Towner v. State, 837 So. 2d 221 (Miss. Ct. App. 2003).

6 Okla.—Robinson v. State, 2011 OK CR 15, 255 P.3d 425 (Okla. Crim. App. 2011).

7 U.S.—U.S. v. Martinez-Salazar, 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000).

8 U.S.—Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (holding modified on other grounds by, Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)).

9 U.S.—Rivera v. Illinois, 556 U.S. 148, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009).

10 Kan.—State v. Carr, 300 Kan. 1, 331 P.3d 544 (2014).

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16C C.J.S. Constitutional Law § 1719

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

3. Course and Conduct of Trial

§ 1719. General due process requirements regarding course and conduct of trial

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4555 to 4557, 4606

Due process of law in a criminal case requires a fair and impartial trial according to the prescribed forms of judicial procedure and the law and evidence in the case.

Due process of law in a criminal case requires not only a trial or hearing before judgment and conviction[1] but also a fair and impartial trial or hearing[2] according to the due and orderly course of the law,[3] the prescribed forms of judicial procedure,[4] and the law and evidence in the case.[5] It is not afforded, in the absence of a corrective judicial process to remedy the wrong, by a mere pretense of a trial.[6] The dictates of due process necessitate that a defendant's right to a fair and impartial trial be protected in the first instance by the trial court.[7]

The requirement of due process of law is met where a trial is had according to the settled course of judicial proceedings, at least where the trial is a fair and impartial one and fundamental principles of justice are not violated.[8] The Fourteenth Amendment is a protection against criminal trials in state courts conducted in a manner which amounts to a disregard of that fundamental fairness essential to the very concept of justice and in a way that necessarily prevents a fair trial.[9]

Criminal defendants have a constitutional right, implicit in the Sixth Amendment, to present a defense, and this right is a fundamental element of due process of law.[10]

A trial is fundamentally unfair, in violation of due process, if there is a reasonable probability that the verdict might have been different had the trial been properly conducted.[11] Thus, due process does not require a perfect[12] or errorless[13] trial. Where the trial is conducted in accordance with the general principles of the prescribed procedure, mere errors of the trial court in the application of these principles may not constitute a denial of due process of law[14] as where errors are harmless.[15] However, there is a denial of due process by reason of error in a trial procedure where the asserted error is so gross, conspicuously prejudicial,[16] or otherwise of such magnitude that it fatally infects the trial and fails to afford the fundamental fairness which is the essence of due process.[17] Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone may cumulatively produce a trial setting that is fundamentally unfair.[18] Obviously, a reviewing court cannot say that the guaranty of due process has been or is being violated where there is nothing whatever in the record indicating that accused has not received a fair and impartial trial or is being deprived of life or liberty without due process of law.[19]

Due process of law does not require that all criminal trials be stenographically reported[20] or transcribed.[21] However, due process does require that, for the purposes of appeal, there be at least an equivalent picture of what took place below.[22] Statutes permitting the court to deny defendant the availability of a phonographic reporter, or an electronic recording device, or some equivalent means of reasonably assuring an accurate verbatim account of the courtroom proceedings, fail to comport with constitutional principles of due process.[23]

Absent security concerns, confining a defendant to a prisoner's dock violates the defendant's due process rights.[24]

Administering medication to defendant.

Where a state administers medication to a defendant at trial, due process requires that the State show that the treatment is medically appropriate and necessary to accomplish an essential state policy.[25]

CUMULATIVE SUPPLEMENT

Cases:

To find denial of due process in state criminal trial based on lack of fundamental fairness, court must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial. U.S. Const. Amend. 14. State v. Reimonenq, 286 So. 3d 412 (La. 2019).

Use of reconstructed transcript, due to lack of transcription of two witnesses' testimony, did not violate murder defendant's due process or equal protection rights, where reconstruction was made pursuant to trial judge's notes on missing testimony. U.S. Const. Amend. 14. Commonwealth v. Imbert, 479 Mass. 575, 97 N.E.3d 335 (2018).

[END OF SUPPLEMENT]

Footnotes

1 Colo.—People v. Max, 70 Colo. 100, 198 P. 150 (1921).

Bill of Rights

The Supreme Court increasingly looks to the specific guaranties of the Bill of Rights to determine whether a state criminal trial was conducted with due process of law.

U.S.—Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

2 U.S.—Bracy v. Gramley, 520 U.S. 899, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997); Bigby v. Dretke, 402 F.3d 551 (5th Cir. 2005).

Conn.—State v. Gonzalez, 272 Conn. 515, 864 A.2d 847 (2005).

Idaho—State v. Laymon, 140 Idaho 768, 101 P.3d 712 (Ct. App. 2004).

Minn.—State v. Varner, 643 N.W.2d 298 (Minn. 2002).

Mont.—State v. Wing, 2008 MT 218, 344 Mont. 243, 188 P.3d 999 (2008).

Wis.—State v. Carprue, 2004 WI 111, 274 Wis. 2d 656, 683 N.W.2d 31 (2004).

3 U.S.—Cole v. State of Ark., 333 U.S. 196, 68 S. Ct. 514, 92 L. Ed. 644 (1948).

4 U.S.—Williams v. People of State of N.Y., 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949).

Ariz.—State v. Lopez, 3 Ariz. App. 200, 412 P.2d 882 (1966).

Cal.—People v. Oliver, 46 Cal. App. 3d 747, 120 Cal. Rptr. 368 (4th Dist. 1975).

5 U.S.—Carty v. U.S., 190 F.2d 99 (9th Cir. 1951).

Ariz.—State v. Lopez, 3 Ariz. App. 200, 412 P.2d 882 (1966).

Pa.—Com. v. Sojourner, 268 Pa. Super. 472, 408 A.2d 1100 (1978), on reh'g, 268 Pa. Super. 488, 408 A.2d 1108 (1979).

Recantation of testimony

The mere recantation of testimony against an accused is not in itself ground for invoking the Due Process Clause against a conviction.

U.S.—Hysler v. State of Florida, 315 U.S. 411, 62 S. Ct. 688, 86 L. Ed. 932 (1942).

6 U.S.—Wilson v. Lanagan, 19 F. Supp. 870 (D. Mass. 1937), order aff'd, 99 F.2d 544 (C.C.A. 1st Cir. 1938).

Minn.—State ex rel. Butler v. Swenson, 243 Minn. 24, 66 N.W.2d 1 (1954).

Trial in court of law rather than trial by ordeal

U.S.—U.S. v. Lynch, 94 F. Supp. 1011 (N.D. Ga. 1950), judgment aff'd, 189 F.2d 476 (5th Cir. 1951).

Alaska—Lee v. State, 511 P.2d 1076 (Alaska 1973).

7 U.S.—Sher v. Stoughton, 516 F. Supp. 534 (N.D. N.Y. 1981), judgment rev'd on other grounds, 666 F.2d 791 (2d Cir. 1981).

Cal.—People v. Fuller, 136 Cal. App. 3d 403, 186 Cal. Rptr. 283 (1st Dist. 1982).

Tex.—Henley v. State, 576 S.W.2d 66 (Tex. Crim. App. 1978).

8 U.S.—Davis v. Bennett, 400 F.2d 279 (8th Cir. 1968); Woodcock v. Amaral, 373 F. Supp. 644 (D. Mass. 1974), decision aff'd, 511 F.2d 985 (1st Cir. 1974).

Or.—State v. Davis, 7 Or. App. 37, 489 P.2d 988 (1971).

Competing harms defense

In prosecution for criminal trespass of nuclear power plant, defendant was not denied due process by trial court's refusal to allow jury to hear his argument on competing harms defense and, on that basis, find him not guilty, in view of fact that trial judge had instructed jury that they were entitled to act upon their own conscientious feeling about what was fair result in case and jury could have found defendant not guilty had it wished to do so.

N.H.—State v. Weitzman, 121 N.H. 83, 427 A.2d 3 (1981).

Hearing impairment devices used by drivers

Where conduct of defendant, who was convicted pursuant to statute prohibiting use by drivers of hearing impairment devices, was clearly proscribed by first clause of statute, which provides that no driver shall operate vehicle while wearing one or more headphones, trial court did not erroneously interpret statute, thereby usurping regulatory function of department of transportation resulting in denial of due process, by convicting defendant under such statute even though second clause of statute authorizes the department to promulgate and issue regulations prohibiting wearing of any other device that it determines would impair driver's hearing ability.

Pa.—Com. v. Patchett, 284 Pa. Super. 252, 425 A.2d 798 (1981).

9 U.S.—Adamson v. People of State of California, 332 U.S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903, 171 A.L.R. 1223 (1947) (overruled in part on other grounds by, Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)).

Ga.—Landers v. Smith, 226 Ga. 274, 174 S.E.2d 427 (1970).

10 Tenn.—State v. Rice, 184 S.W.3d 646 (Tenn. 2006).

Under both state and federal constitutions

Minn.—State v. Beecroft, 813 N.W.2d 814 (Minn. 2012).

11 U.S.—McAfee v. Thaler, 630 F.3d 383 (5th Cir. 2011).

12 Colo.—People v. Dunaway, 88 P.3d 619 (Colo. 2004).

Conn.—State v. Alston, 272 Conn. 432, 862 A.2d 817 (2005).

Ohio—State v. Williams, 126 Ohio Misc. 2d 47, 2003-Ohio-7294, 802 N.E.2d 195 (Mun. Ct. 2003).

13 Idaho—State v. Laymon, 140 Idaho 768, 101 P.3d 712 (Ct. App. 2004).

Ohio—State v. Williams, 126 Ohio Misc. 2d 47, 2003-Ohio-7294, 802 N.E.2d 195 (Mun. Ct. 2003).

S.D.—State v. Smith, 1999 SD 83, 599 N.W.2d 344 (S.D. 1999).

14 U.S.—Sunal v. Large, 332 U.S. 174, 67 S. Ct. 1588, 91 L. Ed. 1982 (1947).

Ky.—Seay v. Com., 609 S.W.2d 128 (Ky. 1980).

Tex.—Wood v. State, 511 S.W.2d 37 (Tex. Crim. App. 1974).

Immunity from judicial error

The Fourteenth Amendment does not, in guaranteeing due process, assure immunity from judicial error.

U.S.—Stein v. People of State of New York, 346 U.S. 156, 73 S. Ct. 1077, 97 L. Ed. 1522 (1953) (overruled in part on other grounds by, Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, 1 A.L.R.3d 1205 (1964)).

Kan.—State v. Boone, 218 Kan. 482, 543 P.2d 945 (1975).

15 U.S.—St. Lawrence v. Scully, 523 F. Supp. 1290 (S.D. N.Y. 1981), aff'd, 697 F.2d 296 (2d Cir. 1982).

Ind.—Drollinger v. State, 274 Ind. 5, 408 N.E.2d 1228 (1980).

N.M.—State v. Lattin, 1967-NMSC-115, 78 N.M. 49, 428 P.2d 23 (1967).

16 U.S.—Maggitt v. Wyrick, 533 F.2d 383 (8th Cir. 1976); U. S. ex rel. Cummings v. Wyrick, 525 F. Supp. 142 (E.D. Mo. 1981).

17 U.S.—Young v. Workman, 383 F.3d 1233 (10th Cir. 2004).

18 U.S.—U.S. v. Hernandez, 227 F.3d 686, 2000 FED App. 0340P (6th Cir. 2000).

19 U.S.—Buchalter v. People of State of New York, 319 U.S. 427, 63 S. Ct. 1129, 87 L. Ed. 1492 (1943).

Colo.—Leick v. People, 131 Colo. 353, 281 P.2d 806 (1955).

Ky.—Drake v. Commonwealth, 263 Ky. 107, 91 S.W.2d 1009 (1936).

20 U.S.—U. S. ex rel. Luzaich v. Catalano, 401 F. Supp. 454 (W.D. Pa. 1975).

21 Ill.—People v. Johnson, 28 Ill. App. 3d 102, 327 N.E.2d 608 (4th Dist. 1975).

Opening and closing addresses to jury

Okla.—Byrd v. State, 1975 OK CR 16, 530 P.2d 1364 (Okla. Crim. App. 1975).

Pa.—Com. v. Silvis, 445 Pa. 235, 284 A.2d 740 (1971).

Side-bar conference

Where the ruling of the court on every material point of evidence or law discussed in several side-bar conferences was included in the transcript, the failure to transcribe every side-bar conference verbatim did not violate due process.

Pa.—Com. v. Russell, 459 Pa. 1, 326 A.2d 303 (1974).

22 U.S.—U. S. ex rel. Luzaich v. Catalano, 401 F. Supp. 454 (W.D. Pa. 1975).

Dereliction on part of state

Extraordinary dereliction on the part of the state in providing the relator with a transcript and appeal could amount to a denial of due process requiring that the relator be unconditionally discharged from custody.

W. Va.—State ex rel. Gary v. Warden, Huttonsville Corrections Center, 169 W. Va. 421, 288 S.E.2d 176 (1982).

23 Cal.—In re Armstrong, 126 Cal. App. 3d 565, 178 Cal. Rptr. 902 (1st Dist. 1981).

24 Mass.—Com. v. Wilson, 443 Mass. 122, 819 N.E.2d 919 (2004).

25 U.S.—Riggins v. Nevada, 504 U.S. 127, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992).

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16C C.J.S. Constitutional Law § 1720

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Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

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I. Trial

3. Course and Conduct of Trial

§ 1720. Right to interpreter

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4793

Interpreters for non-English speaking defendants are necessary to implement fundamental notions of due process.

Interpreters for non-English speaking defendants are necessary to implement fundamental notions of due process such as the right to be present at trial, the right to confront one's accusers, and the right to counsel.[1] Failure to provide the defendant, who is unable to comprehend the English language sufficiently to exercise his or her rights during the trial, the continuous assistance of a competent interpreter during the entirety of the trial constitutes a denial of due process.[2] Also, a non-Spanish speaker has the right to an interpreter in the courts of Puerto Rico, which is a right of federal constitutional dimension,[3] and a particular procedure in such courts to that effect is not a violation of due process.[4]

The requirement that an interpreter provide an accurate translation implicates a defendant's due process right to a fair trial as guaranteed by the Fifth Amendment, the ultimate question being whether the translator's performance has rendered the trial fundamentally unfair.[5]

Footnotes

1 Ind.—Arrieta v. State, 878 N.E.2d 1238 (Ind. 2008).

2 Ariz.—State v. Rios, 112 Ariz. 143, 539 P.2d 900 (1975).

Haw.—State v. Faafiti, 54 Haw. 637, 513 P.2d 697 (1973).

Judicial inquiry required

A trial judge's refusal and failure to inquire into a Spanish-speaking defendant's need for and ability to pay for an interpreter violated the defendant's right to due process of law although the defendant was represented by retained counsel.

U.S.—Giraldo-Rincon v. Dugger, 707 F. Supp. 504 (M.D. Fla. 1989).

Translating each question and answer

Due process rights of persons charged with crimes cannot be short cut by avoiding the ritual of translating each question and answer as required by statute when an interpreter is required.

Ill.—People v. Starling, 21 Ill. App. 3d 217, 315 N.E.2d 163 (1st Dist. 1974).

3 U.S.—Jackson v. Garcia, 665 F.2d 395 (1st Cir. 1981).

4 **Fluency in both English and Spanish**

Procedure in the U.S. District Court for the District of Puerto Rico pursuant to which the court, attorneys, jurors, and personnel are required to be fluent in both English and Spanish and pursuant to which interpreter is provided if the accused is unable to comprehend either language and when witness testifies in Spanish does not contravene the constitutional mandates of the Fifth, Sixth, and Fourteenth Amendments.

U.S.—U.S. v. Boria, 371 F. Supp. 1068 (D.P.R. 1973).

5 Neb.—Tapia-Reyes v. Excel Corp., 281 Neb. 15, 793 N.W.2d 319 (2011).

16C C.J.S. Constitutional Law § 1721

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I. Trial

3. Course and Conduct of Trial

§ 1721. Photographic, radio, and television coverage of trial

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4605

All photographic, radio, and television coverage of a criminal trial is not inherently a denial of due process as where there is well-regulated, moderate electronic media coverage.

All photographic, radio, and television coverage of a criminal trial is not inherently a denial of due process[1] as where there is well-regulated, moderate electronic media coverage.[2] However, the due process guaranties of a fair trial require that procedures for news media's access to courtroom assure such a trial.[3]

To demonstrate a denial of due process, the defendant must present specific evidence that the conduct of the trial was adversely affected by its televising.[4] Where such adverse effect is shown, the defendant is deprived of due process.[5]

CUMULATIVE SUPPLEMENT

Cases:

Allowing press to give live updates of criminal trial through the use of social media application was not inherently prejudicial, and did not deprive murder defendant of due process; prior to trial, the court instructed the jury not to receive information about the trial from any source, including internet sources, and the jury was sequestered during the discussion on allowing the press to use social media application for live updates, and the court instructed the press not to use the social media application in a manner that would disrupt the proceedings. U.S.C.A. Const.Amend. 14. Compton v. State, 58 N.E.3d 1006 (Ind. Ct. App. 2016).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Chandler v. Florida, 449 U.S. 560, 101 S. Ct. 802, 66 L. Ed. 2d 740 (1981).
N.Y.—People v. Parise, 137 Misc. 2d 1098, 523 N.Y.S.2d 962 (County Ct. 1988).
Failure of court to prevent photographer from taking defendant's picture
N.H.—State v. Novosel, 120 N.H. 176, 412 A.2d 739 (1980).

2 N.J.—State v. Newsome, 177 N.J. Super. 221, 426 A.2d 68 (App. Div. 1980).

3 U.S.—Callahan v. Lash, 381 F. Supp. 827 (N.D. Ind. 1974).
Fla.—Green v. State, 377 So. 2d 193 (Fla. 3d DCA 1979), approved and remanded on other grounds, 395 So. 2d 532 (Fla. 1981).

4 U.S.—Chandler v. Florida, 449 U.S. 560, 101 S. Ct. 802, 66 L. Ed. 2d 740 (1981).
N.J.—State v. Newsome, 177 N.J. Super. 221, 426 A.2d 68 (App. Div. 1980).
Wash.—State v. Jessup, 31 Wash. App. 304, 641 P.2d 1185 (Div. 1 1982).

5 U.S.—Estes v. State of Tex., 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965).
"Qualitatively different" test
The trial court's evidentiary finding that actual in-court electronic coverage would render an otherwise competent defendant incompetent to stand trial met the requirements of the "qualitatively different" test used to determine whether electronic media should be excluded from the courtroom; accordingly, the trial court was compelled under the due process clause to prohibit electronic media coverage of the court proceedings.
Fla.—State v. Green, 395 So. 2d 532 (Fla. 1981).

16C C.J.S. Constitutional Law § 1722

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§ 1722. Prison garb or physical restraints

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4615, 4616

In the absence of exceptional circumstances, a defendant who is forced to stand trial wearing prison garb is denied due process. Any discretionary determination by the judge that circumstances warrant shackling the defendant must reflect particular concerns related to that defendant, such as security needs or escape risks.

In the absence of exceptional circumstances,[1] a defendant who is forced to stand trial wearing prison garb is denied due process.[2] However, the failure to make an objection to the court as to being tried in such clothes is sufficient to negate the presence of compulsion necessary to establish a constitutional violation.[3]

Shackles or other physical restraints.

Courts may not, consistent with the due process clause, routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of capital proceedings; any discretionary determination by the judge that circumstances warrant shackling must be case-specific, i.e., must reflect particular concerns related to that defendant, such as security needs or escape risks.[4] There must be an essential state interest[5] specific to the defendant on trial.[6] that justifies the physical restraints.

Moreover, where a district court places a defendant in physical restraints visible to the jury, the court should ensure that the record contains a determination by the court that restraints are justified by a state interest specific to that particular trial.[7] Where a court, without adequate justification, orders a defendant to wear shackles that will be seen by the jury, defendant need not demonstrate actual prejudice to make out a due process violation; instead, the State must prove beyond a reasonable doubt that the shackling error did not contribute to the verdict obtained.[8]

Invisible shackles may be used without triggering due process concerns;[9] however, while it has been suggested that a curtain at the defense table may be used to render leg shackles invisible,[10] there is also authority that the use of bunting around the defense table to block the jury's view of the defendant's leg shackles is insufficient where it cannot be determined from the record that the shackles were not visible to jury or that the jury, seeing bunting around the defense table and not the prosecution's table, would not have inferred that it was there to hide shackles on the defendant's legs.[11]

CUMULATIVE SUPPLEMENT

Cases:

Where a particular practice related to the shackling of defendant or compelling defendant to appear in prison clothing before the jury poses an inherent threat to a defendant's due process right to a fair trial under the Fourteenth Amendment, the practice may still be constitutional where it serves some essential state interest. U.S. Const. Amend. 14; Ky. R. Crim. P. 8.28(5). Deal v. Commonwealth, 607 S.W.3d 652 (Ky. 2020).

A trial court must make a record of its factual findings and reasoning in support of its order requiring a defendant to wear a stun belt, as review is better facilitated by a record of findings that is direct, express, and clearly delineated; however, the standard for determining error in the sufficiency of the judicial record is a functional one, namely, whether the record reveals the findings and reasoning for the court's actions. State v. Guzek, 358 Or. 251, 363 P.3d 480 (2015).

Trial court was not required to explicitly memorialize reason for allowing defendant to be shackled during burglary trial, where State articulated particular reason for shackling, trial judge responded by ordering a board to block jury's view of defendant's shackles, which was implicit acceptance of State's reason for shackling, and defense implicitly accepted prosecutor's reason for shackling and explicitly accepted court's proffered remedy of blocking jury's view. Ex parte Chavez, 560 S.W.3d 191 (Tex. Crim. App. 2018).

[END OF SUPPLEMENT]

Footnotes

1 **Crime committed in prison**
Where defendants were on trial for assault with intent to commit murder, assault on prison guard, and conspiracy to commit those crimes, i.e., crimes allegedly committed in prison, making their identity as prisoners a fact which they could not have concealed from jury, clothing worn by defendants was not marked so as to be readily apparent as prison garb, and trial court inquired before trial whether defendants had any personal clothing which they wished to wear and were not permitted to wear, defendants' Fourteenth Amendment rights were not violated.
Del.—Payne v. State, 367 A.2d 1010 (Del. 1976).
Opportunity to obtain civilian clothes

Defendant's due process rights were not violated when he appeared in his jail clothes during the first day of a jury trial; defendant's trial started two months after his initial trial date, which gave defendant two months to arrange for civilian clothing to be brought to him for trial, and the trial court reminded defendant to obtain civilian clothing the Friday before his trial was scheduled to begin.

Ind.—Bronaugh v. State, 942 N.E.2d 826 (Ind. Ct. App. 2011).

2 U.S.—Estelle v. Williams, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976).

Ala.—Gholston v. State, 620 So. 2d 719 (Ala. 1993).

3 U.S.—Estelle v. Williams, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976).

Ind.—Stephenson v. State, 864 N.E.2d 1022 (Ind. 2007).

Tactical decision by counsel

Where the defendant did not discuss the matter of wearing jail clothes with his attorney or the court but only with the bailiff, no objection to defendant's trial attire was brought to the court's attention, and it appeared that permitting the client to wear prison garb was a tactical decision by defense counsel, there was no denial of due process.

U.S.—Gray v. Estelle, 538 F.2d 1190 (5th Cir. 1976).

4 **Penalty phase of capital proceedings**

Ariz.—State v. Gomez, 211 Ariz. 494, 123 P.3d 1131 (2005).

A.L.R. Library

Propriety and Prejudicial Effect of Requiring Defendant to Wear Stun Belt or Shock Belt During Course of State Criminal Trial, 71 A.L.R.6th 625.

Propriety and prejudicial effect of gagging, shackling, or otherwise physically restraining accused during course of state criminal trial, 90 A.L.R.3d 17 (sec. 21.5 superseded in part Propriety and Prejudicial Effect of Requiring Defendant to Wear Stun Belt or Shock Belt During Course of State Criminal Trial, 71 A.L.R.6th 625).

5 U.S.—Deck v. Missouri, 544 U.S. 622, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005).

Fla.—Huggins v. State, 2014 WL 5026425 (Fla. 2014).

Wash.—In re Davis, 152 Wash. 2d 647, 101 P.3d 1 (2004).

6 Fla.—Huggins v. State, 2014 WL 5026425 (Fla. 2014).

7 La.—State v. Sparks, 68 So. 3d 435 (La. 2011).

N.D.—State v. Aguero, 2010 ND 210, 791 N.W.2d 1 (N.D. 2010).

Defendant's rights violated by failure to articulate justification

N.Y.—People v. Best, 19 N.Y.3d 739, 955 N.Y.S.2d 860, 979 N.E.2d 1187 (2012).

8 U.S.—Deck v. Missouri, 544 U.S. 622, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005); U.S. v. Morales, 758 F.3d 1232 (10th Cir. 2014).

9 U.S.—Deck v. Missouri, 544 U.S. 622, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005).

La.—State v. Sparks, 68 So. 3d 435 (La. 2011).

10 U.S.—Stephenson v. Wilson, 619 F.3d 664 (7th Cir. 2010).

11 N.Y.—People v. Morillo, 104 A.D.3d 792, 960 N.Y.S.2d 224 (2d Dep't 2013), leave to appeal denied, 22 N.Y.3d 1201, 986 N.Y.S.2d 421, 9 N.E.3d 916 (2014).

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16C C.J.S. Constitutional Law § 1723

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3. Course and Conduct of Trial

§ 1723. Unitary or bifurcated trial

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4717

A unitary trial on the issues of both guilt and punishment of the accused does not violate due process of law since due process does not require a bifurcated trial.

A unitary trial on both the issues of guilt and punishment of accused does not violate due process of law.[1] Due process does not require a bifurcated trial,[2] and a denial of a bifurcated trial does not deprive a defendant of due process.[3] However, a bifurcated trial is consistent with due process.[4] Where the application of a unitary procedure results in prejudice to the defendant, denying due process, a bifurcated trial is required[5] although a bifurcated trial is not required if the defendant will not be unduly prejudiced.[6]

In any event, nothing in the Due Process Clause prohibits a state from allowing a jury whether in a unitary or bifurcated trial to determine first the guilt or innocence of accused and then, if it finds accused guilty, to fix the punishment.[7]

Footnotes

1 Cal.—People v. Mills, 48 Cal. 4th 158, 106 Cal. Rptr. 3d 153, 226 P.3d 276 (2010).
Iowa—State v. Hepburn, 270 N.W.2d 629 (Iowa 1978).
Tenn.—Scalf v. State, 565 S.W.2d 506 (Tenn. Crim. App. 1978).
As to enhanced sentences for repeat offenders, see § 1752.

2 Fla.—Barlow v. Taylor, 249 So. 2d 437 (Fla. 1971).
As to bifurcated trial on issue of insanity, see § 1799.

3 U.S.—Gilreath v. Robinson, 544 F. Supp. 569 (E.D. Va. 1982), order aff'd, 705 F.2d 109 (4th Cir. 1983).
Tenn.—State v. Selph, 625 S.W.2d 285 (Tenn. Crim. App. 1981).

4 U.S.—U.S. v. Hayes, 676 F.2d 1359 (11th Cir. 1982).
Miss.—Bell v. State, 353 So. 2d 1141 (Miss. 1977).
Pa.—Com. v. Bradley, 449 Pa. 19, 295 A.2d 842 (1972).
Same jury may serve at both phases, consistently with due process
Cal.—People v. Tolbert, 70 Cal. 2d 790, 76 Cal. Rptr. 445, 452 P.2d 661 (1969).

5 Cal.—People v. Bracamonte, 119 Cal. App. 3d 644, 174 Cal. Rptr. 191 (2d Dist. 1981) (disapproved of on other grounds by, People v. Calderon, 9 Cal. 4th 69, 36 Cal. Rptr. 2d 333, 885 P.2d 83 (1994)).

6 Cal.—People v. Calderon, 9 Cal. 4th 69, 36 Cal. Rptr. 2d 333, 885 P.2d 83 (1994).

7 U.S.—Vines v. Muncy, 553 F.2d 342 (4th Cir. 1977).

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16C C.J.S. Constitutional Law § 1724

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3. Course and Conduct of Trial

§ 1724. Verdicts

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4641 to 4645

A verdict, in order to comport with due process, must be based on evidence received in open court and not from outside sources.

A verdict, in order to comport with process, must be based on evidence received in open court and not from outside sources.[1] It is a denial of due process for a court to support its finding on the sufficiency of the evidence of guilt of accused from matters not received in evidence at the trial.[2]

A statute does not violate due process because it permits the return of a verdict under two different theories of criminal liability without requiring specification of the theory upon which the verdict is based.[3] A factual insufficiency regarding one statutory basis, which is accompanied by a general verdict of guilty that also covers another, factually supported basis, is not a federal due process violation.[4] However, a conviction under a general verdict must be reversed if one of the alternative bases of conviction is legally inadequate; such a conviction violates due process because a jury cannot be expected to reach the correct result when they have been left the option of relying upon a legally inadequate theory.[5]

Unanimity.

Due process does not require a unanimous jury verdict in criminal cases.[6] However, the right of a defendant to a unanimous verdict in a criminal prosecution is guaranteed by the due process provisions of some state constitutions,[7] and the right of a federal criminal defendant to a unanimous verdict has been characterized as a due process right.[8] A simple majority of the jury will not satisfy due process especially when a serious crime is being tried.[9]

Footnotes

1 U.S.—Oswald v. Bertrand, 249 F. Supp. 2d 1078 (E.D. Wis. 2003), aff'd, 374 F.3d 475 (7th Cir. 2004).
Mo.—State v. Rogers, 585 S.W.2d 498 (Mo. Ct. App. E.D. 1979).
Matters outside record
It is denial of due process of law for the trial court to consider matters outside the record.
Ill.—People v. Bowie, 36 Ill. App. 3d 177, 343 N.E.2d 713 (1st Dist. 1976).

2 **Psychiatric report**
A psychiatric report prepared for determining whether the defendant was competent to stand trial was no part of the evidence in the case, and its use deprived the defendant of due process of law.
Ind.—Skinner v. State, 427 N.E.2d 663 (Ind. 1981).
Presentence report
It is violative of due process to use information from a presentence report to bolster in-court testimony on the question of guilt.
Ind.—Hardin v. State, 260 Ind. 501, 296 N.E.2d 784 (1973).

3 Pa.—Com. v. Gonzales, 463 Pa. 597, 345 A.2d 691 (1975).

4 Conn.—State v. King, 289 Conn. 496, 958 A.2d 731 (2008).

5 N.M.—State v. Mailman, 2010-NMSC-036, 148 N.M. 702, 242 P.3d 269, 95 A.L.R.6th 709 (2010).

6 U.S.—Apodaca v. Oregon, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972).
Colo.—People v. Barton, 58 P.3d 1075 (Colo. App. 2002).
La.—State v. Shanks, 715 So. 2d 157 (La. Ct. App. 1st Cir. 1998).
Va.—Holloman v. Com., 23 Va. App. 183, 475 S.E.2d 815 (1996).

7 Haw.—State v. Arceo, 84 Haw. 1, 928 P.2d 843 (1996).

8 U.S.—Schad v. Arizona, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991).
Cal.—People v. Hajek, 58 Cal. 4th 1144, 171 Cal. Rptr. 3d 234, 324 P.3d 88 (2014), cert. denied, 135 S. Ct. 1399 (2015) and cert. denied, 135 S. Ct. 1400 (2015).
Ky.—Johnson v. Com., 405 S.W.3d 439 (Ky. 2013).

9 U.S.—U. S. ex rel. Williams v. DeRobertis, 538 F. Supp. 899 (N.D. Ill. 1982), judgment rev'd on other grounds, 715 F.2d 1174 (7th Cir. 1983).

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I. Trial

4. Actions and Comments of Judge, Jury, or Prosecutor

§ 1725. Actions and comments of judge

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4623

In a criminal case, the actions of and comments by the trial judge must comport with due process.

The conduct[1] or remarks[2] by a trial judge in a criminal case constitute a denial of due process where they are fundamentally unfair. So, the guaranty of due process of law may be violated by the absence of the judge for a considerable time during the argument of the case,[3] or by a refusal to permit accused to be heard at the proper time, as, on the question of the free and voluntary character of a confession, at the preliminary inquiry as to its admissibility.[4] However, where alleged bias or prejudice,[5] conduct,[6] or comments and remarks[7] by the judge do not prejudice the defendant and deprive the defendant of fundamental fairness, there is no denial of due process. It is not unconstitutional under the Due Process Clause for a trial judge to seek clarification from witnesses at a criminal trial.[8]

In various instances, the judge's conduct in relation,[9] or the judge's remarks,[10] to the jury were of such prejudicial nature so as to deprive accused of due process. In other cases, however, a judge's conduct with respect,[11] or remarks,[12] to the jury did not deny due process, especially where prejudice, if any, is cured by timely and several cautionary instructions.[13]

Private investigation by judge.

A trial judge is limited in his or her deliberations to the record made before the judge at the trial, and a determination based on any private investigation by the judge constitutes a denial of due process to the accused[14] provided the judge has used the information outside the record to contradict important evidence offered by the defendant[15] or relied upon private knowledge concerning the evidence.[16]

Footnotes

1 U.S.—Grooms v. Wainwright, 610 F.2d 344 (5th Cir. 1980).
Extensive examination and intimidation of witnesses
(1) Where the trial judge, in the jury's presence extensively examined the defendant's witnesses, censured them and commented as to their credibility, the requirements of a fair and impartial trial were violated, which resulted in a denial of due process, since such conduct may have influenced the jury in its verdict.
Haw.—State v. Yoshino, 50 Haw. 287, 439 P.2d 666 (1968).
(2) The defendant may be denied due process of law where the court's conduct has had the effect of intimidating a witness.
Wash.—City of Seattle v. Arensmeyer, 6 Wash. App. 116, 491 P.2d 1305 (Div. 1 1971).

2 U.S.—Webb v. Texas, 409 U.S. 95, 93 S. Ct. 351, 34 L. Ed. 2d 330 (1972).
Driving witnesses off the stand
Where when two codefendants plead guilty trial judge said he would impose minimum sentences and also stated that if they testified perjuriously on defendant's behalf, i.e., if jury rejected their testimony, more severe sentence would be imposed and when codefendants were called by defense counsel they refused to testify, defendant's due process rights were violated since trial court's remarks effectively drove witnesses off the stand.
N.Y.—People v. Ramos, 63 A.D.2d 1009, 406 N.Y.S.2d 123 (2d Dep't 1978).
A.L.R. Library
Admonitions against perjury or threats to prosecute potential defense witness, inducing refusal to testify, as prejudicial error, 88 A.L.R.4th 388.

3 Cal.—People v. Tupper, 122 Cal. 424, 55 P. 125 (1898).
Inattentiveness
A moment of inattentiveness by the court during the trial was not a denial of due process.
Tex.—Gasway v. State, 157 Tex. Crim. 647, 248 S.W.2d 942 (1952).

4 Miss.—Warren v. State, 174 Miss. 63, 164 So. 234 (1935).

5 U.S.—Olsen v. Wainwright, 565 F.2d 906 (5th Cir. 1978); U.S. v. Conforte, 457 F. Supp. 641 (D. Nev. 1978), judgment aff'd, 624 F.2d 869 (9th Cir. 1980).
Bias not shown
A state trial judge was not biased against a murder defendant, so as to violate his due process rights, even though the judge ruled against the defendant on various motions, where the judge's remarks revealed little more than occasional mild frustration with the defendant's pro se lawyering skills.
U.S.—Larson v. Palmateer, 515 F.3d 1057 (9th Cir. 2008).

6 U.S.—U.S. v. Carignan, 600 F.2d 762 (9th Cir. 1979); Mitchell v. Wyrick, 536 F. Supp. 395 (E.D. Mo. 1982), judgment aff'd, 698 F.2d 940 (8th Cir. 1983).
Mass.—Com. v. Wilson, 381 Mass. 90, 407 N.E.2d 1229 (1980).
Ex parte communication with expert
U.S.—U.S. v. Green, 544 F.2d 138, 1 Fed. R. Evid. Serv. 387 (3d Cir. 1976).
Interruption of trial

(1) Even if the trial judge interrupted the trial with jokes, stories, and personal reminiscences, the trial was not thereby rendered fundamentally unfair so as to amount to a deprivation of due process where the introduction of evidence was not thwarted.

U.S.—Buckelew v. U.S., 575 F.2d 515 (5th Cir. 1978).

(2) The defendant in a first-degree murder prosecution was not deprived of due process of law by the trial court's alleged continual threats, interruptions, pressure, and disparagement of counsel throughout the trial.

Tenn.—State v. Jefferson, 529 S.W.2d 674 (Tenn. 1975).

7 U.S.—U.S. v. Cavale, 688 F.2d 1098, 11 Fed. R. Evid. Serv. 323 (7th Cir. 1982).

Del.—Conlow v. State, 441 A.2d 638 (Del. 1982).

Remark to defendant to "shut up"

The trial judge's remark to the defendant during the trial to "shut up" did not deprive the defendant of due process, in view of the fact that, when the remark was made, the defendant had interrupted his own counsel who was in the act of making an objection and that it was the court's duty and responsibility to allow defendant's counsel the privilege of recording his objection.

Mich.—People v. Esse, 8 Mich. App. 362, 154 N.W.2d 545 (1967).

Disagreement with appellate decisions

A capital murder defendant was not deprived of due process and fundamental fairness when the trial judge made comments regarding his disagreement with recent appellate opinions restricting a trial court's authority to shackle or restrain defendants; the trial judge took care to comply with the mandated procedure regarding shackling in that he set forth more of the record than was necessary to justify the physical restraints and security measures that he utilized.

Ill.—People v. Urdiales, 225 Ill. 2d 354, 312 Ill. Dec. 876, 871 N.E.2d 669 (2007), as modified on denial of reh'g, (May 29, 2007).

8 U.S.—Brown v. Palmer, 358 F. Supp. 2d 648 (E.D. Mich. 2005), judgment aff'd, 441 F.3d 347, 2006 FED App. 0094P (6th Cir. 2006).

9 **Communication between judge and juror in absence of accused and counsel**

U.S.—Burson v. Engle, 432 F. Supp. 929 (N.D. Ohio 1977), aff'd, 595 F.2d 1222 (6th Cir. 1979).

10 U.S.—Jones v. Norvell, 472 F.2d 1185 (6th Cir. 1973).

11 U.S.—Buckelew v. U.S., 575 F.2d 515 (5th Cir. 1978).

Illness; falling asleep

U.S.—Buckelew v. U.S., 575 F.2d 515 (5th Cir. 1978).

12 U.S.—Bryan v. Wainwright, 511 F.2d 644 (5th Cir. 1975).

Wis.—State v. Sarinske, 91 Wis. 2d 14, 280 N.W.2d 725 (1979).

13 U.S.—U.S. v. Schoor, 597 F.2d 1303 (9th Cir. 1979).

14 Ill.—People v. Harris, 57 Ill. 2d 228, 314 N.E.2d 465 (1974).

As to private investigation by court and presence of accused, see § 1702.

15 Ill.—People v. Banks, 102 Ill. App. 3d 877, 58 Ill. Dec. 570, 430 N.E.2d 602 (1st Dist. 1981).

16 Ill.—People v. Schultz, 99 Ill. App. 3d 762, 55 Ill. Dec. 94, 425 N.E.2d 1267 (3d Dist. 1981).

End of Document

16C C.J.S. Constitutional Law § 1726

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

4. Actions and Comments of Judge, Jury, or Prosecutor

§ 1726. Actions and comments of jury

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4761

In a criminal prosecution, where a juror's misconduct is prejudicial to the accused, there is a denial of due process.

In a criminal prosecution, misconduct involving the jury[1] or a particular juror[2] does not necessarily deprive accused of due process as where a juror's misconduct has no effect on the decision of the jury.[3] However, where a juror's misconduct is prejudicial to the defendant, there is a denial of due process.[4]

Due process is not denied just because the jury deliberates for a relatively short period of time.[5] The transmittal of unauthorized objects into a jury room by inadvertence or mistake has not been considered a denial of due process.[6]

CUMULATIVE SUPPLEMENT

Cases:

District court's decision, after it had polled jurors and discovered that one juror had English language proficiency and memory problems that cast doubt upon whether juror understood verdict as read by foreperson, in electing to excuse juror, choosing to seat alternate juror, and instructing reconstituted jury to begin deliberating anew, while denying defendant's request for mistrial, did not violate defendant's Fifth Amendment right to due process or his Sixth Amendment right to impartial jury; there was nothing in the record to suggest that decision to seat an alternate had prejudiced defendant in any way. U.S. Const. Amends. 5, 6. United States v. James, 948 F.3d 638 (3d Cir. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Ind.—Whitley v. State, 439 N.E.2d 715 (Ind. Ct. App. 1982).
Premature discussion of testimony
Jury misconduct in the form of premature discussion of testimony was not so prejudicial as to violate due process; no juror expressed the opinion that the defendant was guilty, there was no evidence that any juror presented extrajudicial information to other jurors or tried to persuade other jurors as to any issue or testimony, defense counsel promptly brought the misconduct to the judge's attention, and the judge immediately gave a curative instruction.
Ga.—Arnold v. State, 243 Ga. App. 118, 532 S.E.2d 458 (2000).

2 U.S.—U.S. v. Winters, 434 F. Supp. 1181 (N.D. Ind. 1977), judgment aff'd, 582 F.2d 1152 (7th Cir. 1978).
Falling asleep; hard of hearing
Kan.—State v. Wright, 203 Kan. 54, 453 P.2d 1 (1969).
Intoxication
Where the record on appeal did not disclose that a juror who allegedly had an odor of alcohol on his breath was intoxicated so as to prevent the proper performance of his duties, the defendant was not denied due process on the theory that the trial judge did not investigate to the fullest possible extent the reported drinking by the juror.
Okla.—Stidham v. State, 1972 OK CR 333, 503 P.2d 905 (Okla. Crim. App. 1972).

3 **Jury foreman making notes during recess**
U.S.—Kehn v. McFaul, 614 F.2d 1120 (6th Cir. 1980).

4 N.Y.—People v. Huntley, 87 A.D.2d 488, 452 N.Y.S.2d 952 (4th Dep't 1982), order aff'd, 59 N.Y.2d 868, 465 N.Y.S.2d 929, 452 N.E.2d 1257 (1983).

5 Ala.—Hollis v. State, 417 So. 2d 617 (Ala. Crim. App. 1982).
Me.—State v. Hachey, 278 A.2d 397 (Me. 1971).

6 D.C.—Vaughn v. U. S., 367 A.2d 1291 (D.C. 1977).

16C C.J.S. Constitutional Law § 1727

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

4. Actions and Comments of Judge, Jury, or Prosecutor

§ 1727. Actions and comments of prosecutor

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4629

Prosecutorial misconduct or the prosecutor's comments and remarks in a criminal trial may deprive the accused of due process of law where they are so prejudicial as to deny the accused a fair trial.

Prosecutorial misconduct[1] or prosecutor's comments and remarks[2] in a criminal trial may deprive the accused of due process of law where they are so prejudicial as to deny the accused a fair trial.

The Due Process Clause forbids comment by the prosecution on the accused's exercise of the right to remain silent.[3] Accordingly, due process is violated when the prosecution calls attention to the silence of accused at the time of the accused's arrest[4] or after arrest.[5] Also, a comment on the defendant's failure to testify is a denial of due process,[6] but due process is not denied where such comment is not prejudicial to the accused.[7] Due process does not prohibit a prosecutor from emphasizing a criminal defendant's motive to exaggerate exculpatory facts.[8]

In determining whether a prosecutor's argument or action violates the limits of what is permissible so as to give rise to a due process claim, standards will be looked to for guidance, and each case must be decided on its own facts, and challenged remarks or actions must be evaluated in the context of the entire trial.[9] It is not enough that the prosecutors' remarks were undesirable or even universally condemned.[10] To prove prosecutorial misconduct, the defendant must establish that the trial as a whole was fundamentally unfair and that the misconduct so infected the trial with unfairness as to make the conviction a denial of due process.[11] The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial and not the culpability of the prosecutor.[12] To determine whether a prosecutor's remarks were sufficiently egregious to result in a denial of due process, a court may consider: (1) whether the remarks were isolated, ambiguous, or unintentional; (2) whether there was a contemporaneous objection by defense counsel; (3) the trial court's instructions; (4) the weight of any aggravating and mitigating factors; (5) the degree to which the challenged remarks had a tendency to mislead the jury and to prejudice the defendant; and (6) the strength of competent proof to establish defendant's guilt.[13]

In various instances, it has been held that the prosecutor's conduct[14] or the prosecutor's comments and remarks[15] in a closing argument or summation[16] violated the defendant's due process rights. On the other hand, in other cases, it has been held that accused was not a victim of prosecutorial misconduct that deprived the accused of due process of law[17] or that the prosecutor's inquiry on cross-examination[18] or the prosecutor's various comments and remarks[19] in an opening statement[20] or in a closing argument or summation[21] were not so prejudicial as to deny accused due process.

Inconsistent theories.

A due process violation resulting from inconsistent theories presented in the prosecution's case will only be found when the demonstrated inconsistency exists at the core of the State's case.[22] Discrepancies based on rational inferences from ambiguous evidence will not support a due process violation provided the two theories are supported by consistent underlying facts.[23]

CUMULATIVE SUPPLEMENT

Cases:

Among the factors a court uses to evaluate the context of a prosecutor's improper statements, in determining whether such statements so infected a criminal trial with unfairness as to deprive the defendant of due process, are the severity of the improper statements, whether the statements were invited by defense argument, whether the trial judge issued appropriate curative jury instructions, and the weight of the evidence against the defendant. U.S. Const. Amend. 5. Taylor v. Medeiros, 983 F.3d 566 (1st Cir. 2020).

At closing argument of Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy trial, prosecutor's improper statements regarding defendant's crying during trial testimony did not cause substantial prejudice, and thus did not amount to due process violation; district court crafted curative instruction that sustained defense counsel's objection, described comments as improper, struck comments, clarified that many inferences could be drawn from defendant's demeanor, and reminded jurors that they could only consider admitted evidence, improper comments were isolated and anomalous in otherwise uneventful trial, and there was substantial other evidence, including bank records and witness testimony, of defendant's guilt. U.S. Const. Amend. 5; 18 U.S.C.A. § 1962(d). United States v. Zemlyansky, 908 F.3d 1 (2d Cir. 2018).

A claim of prosecutorial misconduct must be viewed in context, in determining whether reversal is required; only by doing so can it be determined whether the prosecutor's conduct affected the fairness of the trial under the due process clause. U.S. Const. Amend. 5. United States v. James, 955 F.3d 336 (3d Cir. 2020).

On a prosecutorial misconduct claim, in determining whether prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process, courts look to various factors, including the weight of the evidence, the prominence of the comment in the context of the entire trial, whether the prosecution misstated the evidence, whether the judge instructed the jury to disregard the comment, whether the comment was invited by defense counsel in its summation, and whether defense counsel had an adequate opportunity to rebut the comment. U.S. Const. Amend. 14. Floyd v. Filson, 940 F.3d 1082 (9th Cir. 2019).

Prosecutor's misconduct in showing lack of respect, poor courtroom decorum, and engaging in unnecessary verbal attacks on defense counsel and experts did not so permeate and infect defendant's trial as to amount to cumulative error depriving defendant of due process, in capital murder case. U.S. Const. Amend. 14. State v. Hulsey, 408 P.3d 408 (Ariz. 2018).

Prosecutor's remark during opening statement implying that defendant admitted taking handgun allegedly used in shootings to Mexico did not amount to prosecutorial misconduct in first degree murder prosecution, even though statement was not directly supported by evidence; prosecution produced evidence of ambiguous admissions by defendant with respect to handgun and its transport to Mexico, such that prosecutor's characterization of what she expected evidence to show was not wholly unsupported. Cal. Penal Code § 187(a). People v. Flores, 9 Cal. 5th 371, 262 Cal. Rptr. 3d 67, 462 P.3d 919 (Cal. 2020), cert. denied, 2020 WL 6701192 (U.S. 2020) and as modified, (June 24, 2020).

A two-step analytical framework applies to claims of prosecutorial error: first, the appellate court must decide whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's due process right to a fair trial, and second, if error is found, the appellate court must determine whether the error prejudiced the defendant's due process rights to a fair trial. U.S. Const. Amend. 14. State v. Timley, 469 P.3d 54 (Kan. 2020).

Prosecutor's statement, on summation in prosecution for criminal possession of a weapon, characterizing DNA evidence as "overwhelming" proof establishing defendant's "guilt beyond all doubt" was a flagrant distortion of the evidence that caused defendant such substantial prejudice that he was denied due process of law; forensic expert had testified that analysis of DNA evidence collected from gun only indicated that defendant was among one in 15 Americans who could not be excluded as a contributor. U.S.C.A. Const.Amend. 14. People v. Rozier, 143 A.D.3d 1258, 39 N.Y.S.3d 340 (4th Dep't 2016).

Prosecutor's misconduct in asking defendant, during cross-examination, questions requiring defendant to give his opinion regarding credibility of other witnesses, and in stating, during closing argument, her personal opinion regarding defendant's claim of self-defense, did not have prejudicial effect with regard to charge of carrying concealed weapon, and thus, prosecutor's misconduct did not deny defendant fair trial, in violation of due process, with regard to this charge; charge of carrying a concealed weapon could be established from facts at a physical location, jury could have found the facts necessary to convict defendant of carrying concealed weapon all occurred after defendant had displayed gun, and witnesses who defendant was improperly asked to provide an opinion of their veracity and credibility did not provide testimony relevant to the carrying concealed weapon charge. U.S. Const. Amend. 14. State v. Foster, 2020 ND 85, 942 N.W.2d 829 (N.D. 2020).

Prosecution did not commit misconduct, in violation of due process, by allowing detective to testify in murder trial that victim was not a gang member and had no criminal history, even though detective had received information during investigation that victim belonged to a gang and that victim had a juvenile record; there was no actual evidence that victim was in a gang, other witnesses testified that victim was not in a gang, and comment regarding victim's lack of a criminal record was in reference to victim as an adult. (Per Eakin, J., with one justice concurring and two justices concurring in the result.) U.S.C.A. Const.Amend. 14. Com. v. Solano, 129 A.3d 1156 (Pa. 2015).

Trial court presiding over capital murder case involving four victims did not violate due process protections by permitting state to argue that there was circumstantial evidence of sexual motivation for murders, even though prosecution had earlier stipulated

that there was no physical evidence of sexual assault; there were crime scene photographs showing that two of victims' bodies had been found nude or mostly nude, as well as allegations that defendant made sexual comments about one of victims, there was no contention that state withheld any sexual-motivation-related evidence, with exception of medical examiner's possibly contradictory statement regarding positioning of victims' legs, and defendant was permitted to re-interview medical examiner regarding that statement. U.S. Const. Amend. 14. State v. Schierman, 415 P.3d 106 (Wash. 2018).

Prosecutor's statements that jurors had to believe purported sexual assault victims were lying before they could find defendant not guilty did not improperly violate defendant's due process rights; if victims were telling the truth, their testimony satisfied all of the elements of charged sexual assault crimes, only way defendant could have won an acquittal would have been to convince the jury that the victims lied, and defendant offered no weakness in the state's case other than the victims' credibility such that jury verdict necessarily followed credibility determination. U.S. Const. Amend. 14. State v. Bell, 2018 WI 28, 909 N.W.2d 750 (Wis. 2018).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Parker v. Matthews, 132 S. Ct. 2148, 183 L. Ed. 2d 32 (2012).
Conn.—State v. Samuels, 273 Conn. 541, 871 A.2d 1005 (2005).

2 U.S.—U.S. v. Scarfo, 685 F.2d 842 (3d Cir. 1982).
Pa.—Com. v. Scarpino, 494 Pa. 421, 431 A.2d 926 (1981).
Improper closing argument
U.S.—U.S. v. Lighty, 616 F.3d 321, 83 Fed. R. Evid. Serv. 597 (4th Cir. 2010).
D.C.—Woodard v. U.S., 56 A.3d 125 (D.C. 2012).
No prejudice absent conviction
U.S.—U.S. v. Wilson, 624 F.3d 640 (4th Cir. 2010).
Jury not likely to have been misled
U.S.—Thornburg v. Mullin, 422 F.3d 1113, 68 Fed. R. Evid. Serv. 188 (10th Cir. 2005).
Clarification
In a state murder prosecution, the prosecutor did not violate due process by suggesting during closing argument that petitioner had colluded with his lawyer and doctor to manufacture an extreme emotional disturbance defense where the prosecutor immediately clarified that he was not alleging collusion.
U.S.—Parker v. Matthews, 132 S. Ct. 2148, 183 L. Ed. 2d 32 (2012).
A.L.R. Library
Prejudicial effect of statement by prosecutor that verdict, recommendation of punishment, or other finding by jury is subject to review or correction by other authorities, 10 A.L.R.5th 700.

3 U.S.—Williams v. Wolff, 497 F. Supp. 122 (D. Nev. 1980), aff'd, 679 F.2d 904 (9th Cir. 1982).
References to defendant's lack of remorse
S.C.—State v. Perry, 359 S.C. 646, 598 S.E.2d 723 (Ct. App. 2004).

4 Alaska—Stork v. State, 559 P.2d 99 (Alaska 1977).
Wash.—State v. Fricks, 91 Wash. 2d 391, 588 P.2d 1328 (1979).
***Miranda* warnings given on arrest**
U.S.—U.S. v. Massey, 687 F.2d 1348 (10th Cir. 1982).

5 Miss.—McCoy v. State, 878 So. 2d 167 (Miss. Ct. App. 2004).
Use of defendant's postarrest silence to impeach exculpatory story as denial of due process, see § 1667.
Scope of application
(1) The rule that reference to the defendant's postarrest silence constitutes a violation of due process applies equally to references made during the state's case-in-chief and in closing argument.
Wash.—State v. Vargas, 25 Wash. App. 809, 610 P.2d 1 (Div. 3 1980).

(2) The rule that reference to the defendant's postarrest silence constitutes a violation of due process does not apply where the defendant's postarrest silence is being introduced to challenge the defendant's testimony as to the defendant's behavior following arrest.

Wash.—State v. Vargas, 25 Wash. App. 809, 610 P.2d 1 (Div. 3 1980).

6 Ala.—Bailey v. State, 717 So. 2d 3 (Ala. Crim. App. 1997).

7 U.S.—U. S. ex rel. Miller v. Follette, 397 F.2d 363 (2d Cir. 1968).

Counsel focusing jury's attention on defendant's silence

Where defendant's counsel clearly focused jury's attention on defendant's silence first by outlining her contemplated defense in his opening statement and by then stating to court and jury near close of case that defendant would be "next witness," even though defendant did not testify, prosecutor's references in closing remarks to State's evidence as "unrefuted" and "uncontradicted" did not constitute comment on defendant's failure to testify and did not violate defendant's Fifth and Fourteenth Amendment rights.

U.S.—Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).

8 U.S.—Parker v. Matthews, 132 S. Ct. 2148, 183 L. Ed. 2d 32 (2012).

9 U.S.—Greer v. Miller, 483 U.S. 756, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987).

Conn.—State v. Little, 88 Conn. App. 708, 870 A.2d 1170 (2005).

Conduct viewed in context of entire trial

N.D.—Gaede v. State, 2011 ND 162, 801 N.W.2d 707 (N.D. 2011).

10 U.S.—Runningeagle v. Ryan, 686 F.3d 758 (9th Cir. 2012), cert. denied, 133 S. Ct. 2766, 186 L. Ed. 2d 233 (2013).

11 U.S.—Mahaday v. Cason, 367 F. Supp. 2d 1107 (E.D. Mich. 2005), aff'd, 230 Fed. Appx. 542 (6th Cir. 2007).

Ariz.—State v. Burns, 237 Ariz. 1, 344 P.3d 303 (2015).

Cal.—People v. Roldan, 35 Cal. 4th 646, 27 Cal. Rptr. 3d 360, 110 P.3d 289 (2005) (disapproved of on other grounds by, People v. Doolin, 45 Cal. 4th 390, 87 Cal. Rptr. 3d 209, 198 P.3d 11 (2009)).

Conn.—State v. Samuels, 273 Conn. 541, 871 A.2d 1005 (2005).

12 U.S.—Smith v. Phillips, 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982); U.S. v. Liburd, 53 V.I. 890, 607 F.3d 339 (3d Cir. 2010).

Cal.—In re Price, 51 Cal. 4th 547, 121 Cal. Rptr. 3d 572, 247 P.3d 929 (2011).

Conn.—State v. Angel T., 292 Conn. 262, 973 A.2d 1207 (2009).

Ind.—Baer v. State, 866 N.E.2d 752 (Ind. 2007).

La.—State v. Ortiz, 110 So. 3d 1029 (La. 2013), cert. denied, 134 S. Ct. 174, 187 L. Ed. 2d 42 (2013).

13 U.S.—Spencer v. Secretary, Dept. of Corrections, 609 F.3d 1170 (11th Cir. 2010).

Alternate list of factors

In determining whether prosecutorial misconduct is so serious as to amount to a denial of due process, a reviewing court should focus on several factors, including the extent to which the misconduct was invited by defense conduct or argument, the severity of the misconduct, the frequency of the misconduct, the centrality of the misconduct to critical issues in the case, the strength of the curative measures adopted, and the strength of the State's case.

Conn.—State v. Pedro S., 87 Conn. App. 183, 865 A.2d 1177 (2005).

14 U.S.—Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978).

Md.—Campbell v. State, 37 Md. App. 89, 376 A.2d 866 (1977).

Warning to witness

A warning which was given a defense witness by the prosecutor and which carried the implication that the State had enough evidence to proceed against the witness but would do so only if the witness testified operated to prevent the defendant from presenting a witness crucial to his defense and, as such, was violative of due process where it had the effect of causing a refusal to testify on the part of the witness.

Mo.—State v. Brown, 543 S.W.2d 56 (Mo. Ct. App. 1976).

15 U.S.—Foster v. Barbour, 613 F.2d 59 (4th Cir. 1980).

Misstatement of controlling law

Kan.—State v. White, 279 Kan. 326, 109 P.3d 1199 (2005).

16 U.S.—U.S. v. Bigeleisen, 625 F.2d 203 (8th Cir. 1980).

N.Y.—People v. Powell, 64 A.D.2d 676, 407 N.Y.S.2d 233 (2d Dep't 1978).

A.L.R. Library

Propriety and prejudicial effect of counsel's negative characterization or description of witness during summation of criminal trial—modern cases, 88 A.L.R.4th 209.

17 U.S.—Carter v. Jago, 637 F.2d 449 (6th Cir. 1980).

Ind.—Pineiro v. State, 434 N.E.2d 135 (Ind. Ct. App. 1982).

N.Y.—People v. Ortiz, 54 N.Y.2d 288, 445 N.Y.S.2d 116, 429 N.E.2d 794 (1981).

Guns in courtroom

Fla.—Harrell v. State, 405 So. 2d 480 (Fla. 3d DCA 1981).

Different district attorneys

That various proceedings in the case were conducted by different district attorneys did not deny the defendant due process.

Wis.—Bastian v. State, 54 Wis. 2d 240, 194 N.W.2d 687 (1972).

18 U.S.—Smith v. Housewright, 667 F.2d 689 (8th Cir. 1981).

Ind.—Beard v. State, 428 N.E.2d 772 (Ind. 1981).

19 U.S.—Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974).

Ill.—People v. Houston, 81 Ill. App. 3d 753, 36 Ill. Dec. 861, 401 N.E.2d 999 (1st Dist. 1980).

Overwhelming evidence

The petitioner failed to establish that he was prejudiced by the prosecutor's alleged improper remarks at trial for robbery and burglary, as required to support a claim for a denial of due process, given the overwhelming evidence against him, including his confession.

U.S.—Duran v. Miller, 322 F. Supp. 2d 251 (E.D. N.Y. 2004).

Impugning integrity of witness

Improper remarks of the prosecutor impugning the integrity of a witness called by the Commonwealth, which resulted in an admonishment to the prosecutor and instruction to the jury to disregard, did not offend the petitioner's rights of due process.

Pa.—Com. v. Cannon, 458 Pa. 374, 327 A.2d 45 (1974).

20 U.S.—Salemme v. Ristaino, 587 F.2d 81 (1st Cir. 1978).

Mich.—People v. Johnson, 116 Mich. App. 452, 323 N.W.2d 439 (1982).

Racial remark

The prosecutor's isolated remark, in the opening argument of a capital murder trial, that a detective would testify that one or both of the defendant's prior sexual offenses involved young white women and knives, which allegedly appealed to racial prejudice, did not deny the defendant due process of law.

U.S.—Thomas v. Gilmore, 144 F.3d 513 (7th Cir. 1998).

21 U.S.—Bonnell v. Mitchel, 301 F. Supp. 2d 698 (N.D. Ohio 2004), decision aff'd, 212 Fed. Appx. 517, 2007 FED App. 0014N (6th Cir. 2007).

Conn.—State v. Sinvil, 270 Conn. 516, 853 A.2d 105 (2004).

Defendant's presence

The prosecutor's comments during summation regarding the defendant's presence at trial and on the ability to fabricate that his presence afforded him did not deprive the defendant of due process even though a state statute required the defendant to be present at trial.

U.S.—Portuondo v. Agard, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47, 53 Fed. R. Evid. Serv. 337 (2000).

Personal opinion of guilt

The prosecutor's expression in the closing argument of his personal opinion of guilt was reprehensible and should not have been made, but there was no contemporaneous objection, and at most, such expression was a minor trial error which did not rise to the level of a constitutional deprivation of due process.

U.S.—Soap v. Carter, 632 F.2d 872 (10th Cir. 1980).

22 Md.—Sifrit v. State, 383 Md. 77, 857 A.2d 65 (2004).

23 Md.—Sifrit v. State, 383 Md. 77, 857 A.2d 65 (2004).

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16C C.J.S. Constitutional Law § 1728

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Constitutional Law
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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

5. Reception of Evidence; Witnesses

§ 1728. General due process requirements regarding reception of evidence and witnesses

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4650 to 4652, 4673 to 4679, 4692

The Sixth Amendment of the United States Constitution, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, affords the accused the right to be confronted with the witnesses against him or her and to have compulsory process for obtaining witnesses in his or her favor.

The Sixth Amendment of the United States Constitution, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, affords the accused the right to be confronted with the witnesses against him or her,[1] which include the right of cross-examination,[2] and to have compulsory process for obtaining witnesses in his or her favor.[3] The right of the defendant to present witnesses in his or her own behalf in order to establish a defense is a fundamental element of due process of law.[4] Of course, in order to testify, the witnesses must be competent.[5]

The confrontation guaranteed by the Sixth and Fourteenth Amendments is confrontation at trial,[6] that is, the absence of the defendant at the time a codefendant allegedly made an out-of-court statement is immaterial, so long as the declarant can be cross-examined on the witness stand at trial.[7]

Failure of the court to protect the accused's constitutional rights to confront adverse witnesses[8] or to have compulsory process to obtain witnesses[9] is a denial of due process of law. However, depending on the circumstances of the case, the due process right to confrontation has been held not denied[10] as where there is no need, in light of the existing evidence, to call a particular witness;[11] where a witness denied to the defendant could not produce relevant and material testimony for the defense;[12] or where the defendant, although given an opportunity to present evidence in the defendant's behalf, voluntarily rests his or her case.[13]

The exercise of a trial court's discretion to regulate the scope of cross-examination must comport with due process.[14] Where the cross-examination is not so prejudicial as to deprive the defendant of a fair trial, there is no denial of due process.[15] To deprive the accused of the right to cross-examine witnesses against the accused is a denial of due process.[16] However, failure by the trial court to allow defense counsel to cross-examine witnesses may be a harmless error, thus not rising to the level of the denial of due process.[17]

Exclusion of witnesses and evidence; rape-shield laws.

A trial court's proper exercise of discretion in refusing to allow witnesses for the defense to be called,[18] or in excluding evidence,[19] is not a denial of due process. In the absence of prejudice, the accused is not denied due process where the court in the exercise of its discretion excludes the witnesses from the courtroom during the trial[20] or where it exempts particular witnesses from the operation of the rule of exclusion from the courtroom.[21]

Rape-shield statutes, which eliminate the cruel and abusive treatment of the victim at trial by precluding the admission of prejudicial and irrelevant evidence, do not violate the defendant's due process rights to confrontation of witnesses.[22] The test used to determine whether a trial court's exclusion of particular proffered evidence under a rape shield law violates defendant's due process right to a fair trial is whether (1) the testimony was relevant; (2) the probative value of evidence outweighed its prejudicial effect; and (3) the State's compelling interests in excluding evidence outweighed the defendant's right to present relevant evidence supportive of his or her defense; under that test, an appellate court will reverse a trial court's ruling only if there has been a clear abuse of discretion.[23]

Testimony by defendant.

A criminal defendant has a due process right to testify in his or her own behalf.[24] Where the defendant's right to testify conflicts with a rule of evidence, the constitution demands that restrictions imposed on that right not be arbitrary or disproportionate to the purposes they are designed to serve.[25]

Deported undocumented alien witnesses.

To establish a due process violation, a criminal defendant must make a plausible showing that the testimony of deported undocumented alien witnesses would have been material and favorable to the defense, in ways not merely cumulative to the testimony of available witnesses.[26]

CUMULATIVE SUPPLEMENT

Cases:

No fair construction of the Constitution supports the conclusion that the right to compel the attendance of witnesses does not extend to requiring those witnesses to bring with them such papers as may be material in the defense. Trump v. Vance, 140 S. Ct. 2412 (2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).
Ill.—People v. Stechly, 225 Ill. 2d 246, 312 Ill. Dec. 268, 870 N.E.2d 333 (2007).
Md.—State v. Snowden, 385 Md. 64, 867 A.2d 314 (2005).
N.C.—State v. Clark, 165 N.C. App. 279, 598 S.E.2d 213 (2004).
Tenn.—State v. Franklin, 308 S.W.3d 799 (Tenn. 2010).

2 U.S.—Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).
Fla.—Tomengo v. State, 864 So. 2d 525 (Fla. 5th DCA 2004).
La.—State v. Hall, 851 So. 2d 330 (La. Ct. App. 4th Cir. 2003), writ denied, 865 So. 2d 738 (La. 2004).
Minn.—State v. Reese, 692 N.W.2d 736 (Minn. 2005).

3 U.S.—Rock v. Arkansas, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37, 22 Fed. R. Evid. Serv. 1128 (1987).
Conn.—State v. Saunders, 267 Conn. 363, 838 A.2d 186 (2004).
Haw.—State v. Diaz, 100 Haw. 210, 58 P.3d 1257 (2002).
Ill.—People v. McClain, 343 Ill. App. 3d 1122, 278 Ill. Dec. 604, 799 N.E.2d 322 (1st Dist. 2003).

4 U.S.—Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).
D.C.—Myerson v. U.S., 98 A.3d 192 (D.C. 2014), cert. denied, 135 S. Ct. 1725 (2015).
Fla.—McCray v. State, 71 So. 3d 848 (Fla. 2011).
Kan.—Drach v. Bruce, 281 Kan. 1058, 136 P.3d 390 (2006).
Md.—Kelly v. State, 392 Md. 511, 898 A.2d 419 (2006).
Effect of alibi defense
An alibi defense is not "compelled" within the meaning of the Fifth and Fourteenth Amendments, even though it proves to be testimonial and incriminating, where the defendant chooses to present a defense due to the pressures generated by the State's evidence.
U.S.—Williams v. Florida, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970).

5 U.S.—Bonner v. Beto, 373 F.2d 301 (5th Cir. 1967).
Child sexual abuse victim
Due process is not violated by a statute permitting a child sexual abuse victim to testify without prior qualification in any judicial proceeding.
Ala.—Moates v. State, 545 So. 2d 224 (Ala. Crim. App. 1989).

6 U.S.—Nelson v. O'Neil, 402 U.S. 622, 91 S. Ct. 1723, 29 L. Ed. 2d 222 (1971).
Ala.—Stinson v. State, 401 So. 2d 257 (Ala. Crim. App. 1981), writ denied, 401 So. 2d 262 (Ala. 1981).

7 U.S.—Nelson v. O'Neil, 402 U.S. 622, 91 S. Ct. 1723, 29 L. Ed. 2d 222 (1971).
Ala.—Stinson v. State, 401 So. 2d 257 (Ala. Crim. App. 1981), writ denied, 401 So. 2d 262 (Ala. 1981).
Ariz.—State v. Sustaita, 119 Ariz. 583, 583 P.2d 239 (1978).

8 U.S.—Barber v. Page, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968).
Mo.—State v. Dreiling, 601 S.W.2d 660 (Mo. Ct. App. S.D. 1980).
Failure to produce witness list
The failure of the State to produce a witness list is a denial of due process.
Ind.—Kelley v. State, 156 Ind. App. 134, 295 N.E.2d 372 (1973).

9 U.S.—Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).
Ill.—People v. McKiness, 105 Ill. App. 3d 92, 60 Ill. Dec. 908, 433 N.E.2d 1146 (2d Dist. 1982).
As to disclosure of witnesses or informants, see § 1689.

10 Ariz.—State v. Cruz, 123 Ariz. 497, 600 P.2d 1129 (Ct. App. Div. 2 1979).
Ark.—Holloway v. State, 268 Ark. 24, 594 S.W.2d 2 (1980).

Failure to appoint interpreter sua sponte

The petitioner was not denied due process of law and the right of confrontation by the trial court's failure to appoint an interpreter sua sponte since the petitioner clearly had sufficient command of English to have requested an interpreter and since, absent a showing that the court was apprised of a language disability, no prejudice was shown.

U.S.—Rubio v. Estelle, 689 F.2d 533 (5th Cir. 1982).

11 U.S.—U. S. ex rel. Seaman v. Cryan, 329 F. Supp. 875 (D.N.J. 1971).

12 U.S.—U.S. v. De Stefano, 476 F.2d 324 (7th Cir. 1973).

13 N.C.—State v. Shelton, 53 N.C. App. 632, 281 S.E.2d 684 (1981).

14 U.S.—Alo v. Olim, 639 F.2d 466 (9th Cir. 1980).

Wash.—State v. Kalamarski, 27 Wash. App. 787, 620 P.2d 1017 (Div. 3 1980).

15 U.S.—Bivens v. Wyrick, 640 F.2d 179 (8th Cir. 1981).

N.C.—State v. Bumper, 275 N.C. 670, 170 S.E.2d 457 (1969).

16 U.S.—Bruton v. U.S., 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

Confessions made by third persons

Where a third person on separate occasions orally confessed to a friend's murder with which the defendant was charged, under circumstances which bore substantial assurances of trustworthiness, and where such person made, but later repudiated, a written confession, refusal to permit the defendant to cross-examine the third person under the state's common-law "voucher" rule after the defendant called such third person as a witness when the State failed to do so deprived the defendant of a fair trial in violation of due process.

U.S.—Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

17 U.S.—Donaldson v. Dalsheim, 508 F. Supp. 294 (S.D. N.Y. 1981), aff'd, 672 F.2d 899 (2d Cir. 1981).

Ga.—Harris v. State, 160 Ga. App. 47, 285 S.E.2d 781 (1981).

18 U.S.—Thomas v. Wyrick, 520 F. Supp. 139 (E.D. Mo. 1981), judgment aff'd, 687 F.2d 235, 11 Fed. R. Evid. Serv. 455 (8th Cir. 1982).

Utah—State v. Stone, 629 P.2d 442 (Utah 1981).

19 U.S.—U.S. v. MacDonald, 688 F.2d 224, 11 Fed. R. Evid. Serv. 474 (4th Cir. 1982).

N.Y.—People v. Dackowski, 50 N.Y.2d 962, 431 N.Y.S.2d 463, 409 N.E.2d 937 (1980).

20 Ariz.—State v. Parker, 121 Ariz. 172, 589 P.2d 46 (Ct. App. Div. 2 1978).

21 U.S.—U.S. v. Williams, 604 F.2d 1102, 4 Fed. R. Evid. Serv. 1110 (8th Cir. 1979).

Ga.—O'Dillon v. State, 245 Ga. 342, 265 S.E.2d 18 (1980).

22 U.S.—U.S. v. Kasto, 584 F.2d 268, 3 Fed. R. Evid. Serv. 20 (8th Cir. 1978).

Ill.—People v. Cornes, 80 Ill. App. 3d 166, 35 Ill. Dec. 818, 399 N.E.2d 1346 (5th Dist. 1980).

Ky.—Edmonds v. Com., 2012 WL 2362429 (Ky. 2012).

Ohio—State v. Gardner, 59 Ohio St. 2d 14, 13 Ohio Op. 3d 8, 391 N.E.2d 337 (1979).

23 W. Va.—State v. Jonathan B., 230 W. Va. 229, 737 S.E.2d 257 (2012).

24 N.Y.—People v. Terry, 309 A.D.2d 973, 765 N.Y.S.2d 702 (3d Dep't 2003).

25 Minn.—State v. Richardson, 670 N.W.2d 267 (Minn. 2003).

26 U.S.—U.S. v. Perez, 217 F.3d 323, 55 Fed. R. Evid. Serv. 151 (5th Cir. 2000).

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

5. Reception of Evidence; Witnesses

§ 1729. Interference with, or intimidation of, witnesses

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4689

Substantial government interference with a defense witness's free and unhampered choice to testify violates the defendant's due process rights.

Substantial government interference with a defense witness's free and unhampered choice to testify violates the defendant's due process rights[1] as where prejudice results from intimidating the witness.[2] The dispositive question in each case is whether the government actor's interference with a witness' decision to testify was substantial.[3] Interference is substantial when the government actor actively discourages a witness from testifying through threats of prosecution, intimidation, or coercive badgering.[4]

There is no denial of due process where neither the prosecution nor the trial court exerts an improper influence on the witness to prevent the witness from testifying.[5]

Footnotes

1 U.S.—U.S. v. Fricke, 684 F.2d 1126, 11 Fed. R. Evid. Serv. 1090 (5th Cir. 1982).
Cal.—People v. Woods, 120 Cal. App. 4th 929, 16 Cal. Rptr. 3d 174 (4th Dist. 2004).
Ind.—Collins v. State, 822 N.E.2d 214 (Ind. Ct. App. 2005).
S.C.—State v. Inman, 395 S.C. 539, 720 S.E.2d 31 (2011).

2 U.S.—Lambert v. Blackwell, 387 F.3d 210 (3d Cir. 2004).
N.C.—State v. Mackey, 58 N.C. App. 385, 293 S.E.2d 617 (1982).
S.C.—State v. Inman, 395 S.C. 539, 720 S.E.2d 31 (2011).
Driving witness from stand
Mo.—State v. Campbell, 147 S.W.3d 195 (Mo. Ct. App. S.D. 2004).
Threatening witness with prosecution if testifying for accused
Ala.—Thomas v. State, 418 So. 2d 921 (Ala. Crim. App. 1981).

3 U.S.—U.S. v. Serrano, 406 F.3d 1208 (10th Cir. 2005).

4 U.S.—U.S. v. Serrano, 406 F.3d 1208 (10th Cir. 2005).

5 Ill.—People v. Cross, 101 Ill. App. 3d 435, 57 Ill. Dec. 38, 428 N.E.2d 588 (1st Dist. 1981).

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16C C.J.S. Constitutional Law § 1730

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

5. Reception of Evidence; Witnesses

§ 1730. Immunization of witnesses

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4692

The defendant has no due process right to compel a grant of immunity to defense witnesses.

The Due Process Clause does not contain a general requirement that a defense witness be granted immunity whenever it seems fair to grant it.[1] Defendant has no due process rights to compel the immunization of defense witnesses,[2] but the State may not use that power to interfere with the defendant's presentation of the case or to prevent the defendant's witnesses from testifying.[3] It is a denial of due process to offer immunity to a witness on the condition that the witness' testimony produce the conviction.[4] Where a trial is unfair because of a denial of immunity, the accused is deprived of due process.[5]

To prove a due process violation on the basis of the government's refusal to immunize a defense witness, the defendant must show the following five elements: (1) immunity must be properly sought in the district court; (2) the defense witness must be available to testify; (3) the proffered testimony must be clearly exculpatory; (4) the testimony must be essential; and (5) there must be no strong governmental interests which countervail against a grant of immunity.[6]

Due process may be violated in cases in which witnesses favorable to the prosecution are accorded immunity while those whose testimony would be exculpatory of the defendant are not or in cases where the failure to grant immunity deprives the defendant of vital exculpatory testimony.[7] However, denial of due process does not necessarily result from the selective use of grant of immunity to certain prosecution witnesses and denial of immunity to defense witnesses.[8] Generally, except where coupled with showing of prosecutorial misconduct, the refusal of the prosecution to seek the grant of immunity to a defense witness does not constitute a denial of due process.[9] However, a trial court can compel a defense witness's immunity absent a finding of prosecutorial misconduct where in exceptional cases, the fact-finding process may be so distorted through the prosecution's decisions to grant immunity to its own witness while denying immunity to a witness with directly contradictory testimony that the defendant's due process right to a fair trial is violated.[10]

Immunity statutes which provide the government with the power to compel testimony of a witness but which do not afford a correlative right to the accused are not violative of due process.[11] The failure to grant immunity to an informant who asserts a privilege against self-incrimination does not deprive the accused of due process.[12] Since the accused is not deprived of a property or liberty interest by being ordered to give testimony where the use immunity granted the accused is coextensive with the privilege against self-incrimination, due process does not require notice and a hearing before the grant of the use immunity.[13]

CUMULATIVE SUPPLEMENT

Cases:

Government did not violate defendants' due process rights in purportedly withholding use immunity from defense witness to hide exculpatory evidence from jury, at trial on various offenses arising out of corruption scandal in which defendants attempted to gain certification to practice medicine by obtaining falsified scores on required exams, where, at time of trial, government had not made decision to offer witness immunity in subsequent case in which he was potential witness, and purported value of witness's testimony was minimal at best and cumulative of other witnesses. U.S. Const. Amend. 5. United States v. Berroa, 856 F.3d 141 (1st Cir. 2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—U.S. v. Diaz, 176 F.3d 52, 52 Fed. R. Evid. Serv. 380 (2d Cir. 1999).

2 U.S.—U.S. v. Rosario Fuentez, 231 F.3d 700, 55 Fed. R. Evid. Serv. 1298 (10th Cir. 2000).

3 U.S.—U.S. v. La Duca, 447 F. Supp. 779 (D.N.J. 1978), judgment aff'd, 587 F.2d 144 (3d Cir. 1978).
Ind.—Bubb v. State, 434 N.E.2d 120 (Ind. Ct. App. 1982).

4 Cal.—People v. Claxton, 129 Cal. App. 3d 638, 181 Cal. Rptr. 281 (5th Dist. 1982).

5 U.S.—U.S. v. De Palma, 476 F. Supp. 775 (S.D. N.Y. 1979).

6 U.S.—U.S. v. Quinn, 728 F.3d 243 (3d Cir. 2013), cert. denied, 134 S. Ct. 1872, 188 L. Ed. 2d 916 (2014).

7 N.Y.—People v. Shapiro, 50 N.Y.2d 747, 431 N.Y.S.2d 422, 409 N.E.2d 897 (1980).

8 U.S.—U.S. v. Lenz, 616 F.2d 960 (6th Cir. 1980).
Irreconcilable evidence
A variance from the tenor of the State's evidence is highly material, supporting a determination that denying a witness immunization from prosecution would deprive the defendant of due process, only when the variance is irreconcilable with the State's case.
N.H.—State v. Etienne, 163 N.H. 57, 35 A.3d 523 (2011).

9 N.M.—State v. Sanchez, 98 N.M. 428, 1982-NMCA-105, 649 P.2d 496 (Ct. App. 1982) (overruled on other grounds by, State v. Belanger, 2009-NMSC-025, 146 N.M. 357, 210 P.3d 783 (2009)).

10 U.S.—U.S. v. Wilkes, 662 F.3d 524 (9th Cir. 2011).

11 Ariz.—State v. Buchanan, 110 Ariz. 285, 518 P.2d 108 (1974).
Wis.—State v. Boutch, 60 Wis. 2d 397, 210 N.W.2d 751 (1973).

12 U.S.—U.S. v. Jones, 404 F. Supp. 529 (E.D. Pa. 1975), aff'd, 538 F.2d 321 (3d Cir. 1976).
As to compulsory testimony and self-incrimination, see § 1666.

13 U.S.—In re Grand Jury Investigation, 657 F.2d 88 (6th Cir. 1981).

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16C C.J.S. Constitutional Law § 1731

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

5. Reception of Evidence; Witnesses

§ 1731. Witness under hypnosis

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4675

Due process does not require a per se bar to the admission of posthypnosis testimony.

Due process does not require a per se bar to the admission of posthypnosis testimony.[1] In determining whether the admission of posthypnosis testimony violates a defendant's right to due process, the court should determine whether the defendant has shown, from the totality of the circumstances, that the testimony is unreliable.[2]

The trial court does not deprive the defendant of due process by denying the defendant's motion to have the complaining witness hypnotized.[3] Also, a failure to disclose to the defense the statements made by a prosecution witness while in a hypnotic trance does not deprive the defendant of due process of law.[4]

Footnotes

1 U.S.—White v. Ieyoub, 25 F.3d 245 (5th Cir. 1994).
2 U.S.—White v. Ieyoub, 25 F.3d 245 (5th Cir. 1994).
3 Ill.—People v. Renslow, 98 Ill. App. 3d 288, 53 Ill. Dec. 556, 423 N.E.2d 1360 (3d Dist. 1981).
4 Ga.—Creamer v. State, 232 Ga. 136, 205 S.E.2d 240 (1974).

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16C C.J.S. Constitutional Law § 1732

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Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

5. Reception of Evidence; Witnesses

§ 1732. Impeachment of witnesses

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4679

Due process requires cross-examination for impeachment purposes.

Due process requires cross-examination for impeachment purposes.[1] Where a witness testifies unfavorably against the accused at a preliminary hearing and such testimony is allowed at the trial because of the absence of the witness, the accused has a due process right to introduce, for impeachment purposes, written evidence originating after the preliminary hearing which refutes the testimony.[2]

The use of prior convictions for impeachment purposes is subject to constitutional guaranties requiring due process,[3] but generally, such use is not violative of due process.[4] Due process is not denied by a statutory provision or rule of evidence that permits the State to introduce the prior convictions of accused to impeach the accused's credibility at the trial.[5]

Where the prosecutor uses the defendant's involuntary statement to impeach the defendant's trial testimony, the defendant is denied due process of law.[6] Furthermore, the prosecution violates a defendant's due process rights when it uses postarrest silence

to impeach an exculpatory story told at trial.[7] However, absent assurances to a defendant, either explicit or implicit, that the defendant's silence will not be used against the defendant, there is no due process violation in using the defendant's silence to impeach the defendant's testimony at trial.[8]

Footnotes

1 U.S.—Skinner v. Cardwell, 564 F.2d 1381 (9th Cir. 1977).
Testimony of police officer
Allowing a police officer to testify for the prosecution and identify the defendant, but denying defense counsel the right to impeach that testimony by the officer's own report, was a violation of due process.
Ill.—People v. Cagle, 41 Ill. 2d 528, 244 N.E.2d 200 (1969).

2 Ohio—State v. Earley, 49 Ohio App. 2d 377, 3 Ohio Op. 3d 447, 361 N.E.2d 254 (5th Dist. Guernsey County 1975).

3 Wis.—State v. Bowie, 92 Wis. 2d 192, 284 N.W.2d 613 (1979).
Void convictions
The use for impeachment of convictions which are void because uncounseled violates due process.
U.S.—Gibson v. U.S., 575 F.2d 556 (5th Cir. 1978).

4 Alaska—Buchanan v. State, 599 P.2d 749 (Alaska 1979).
N.H.—State v. Kelley, 120 N.H. 12, 413 A.2d 308 (1980).

5 Cal.—People v. Harris, 20 Cal. App. 3d 534, 97 Cal. Rptr. 883 (2d Dist. 1971).
Wash.—State v. Ludwig, 18 Wash. App. 50, 566 P.2d 946 (Div. 3 1977).

6 Idaho—State v. Cherry, 139 Idaho 579, 83 P.3d 123 (Ct. App. 2003).

7 U.S.—Bieghler v. McBride, 389 F.3d 701 (7th Cir. 2004).
Cal.—People v. Coffman, 34 Cal. 4th 1, 17 Cal. Rptr. 3d 710, 96 P.3d 30 (2004), as modified, (Oct. 27, 2004).
Wash.—State v. Holmes, 122 Wash. App. 438, 93 P.3d 212 (Div. 1 2004).

8 U.S.—U.S. v. Quinn, 359 F.3d 666 (4th Cir. 2004).

16C C.J.S. Constitutional Law § 1733

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

6. Instructions

§ 1733. General due process requirements regarding jury instructions

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4636, 4637

In a criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement.

In a criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement.[1] A jury instruction is constitutionally adequate only if it provides the jurors with a clear understanding of the elements of the crime charged and affords them proper guidance for their determination of whether those elements were present.[2] Due process requires that jury instructions must be tailored to fit the allegations in the indictment and the evidence admitted at trial.[3] If a jury charge recites the entire definition of a crime and the indictment does not, there is a reasonable probability that the deviation violated the accused's due process rights by resulting in a conviction of a crime committed in a manner not charged in the indictment.[4] Due process does not require a jury instruction unless the proposed instruction has a rational support in the evidence,[5] and a lesser-included offense instruction should be given only when the evidence warrants such instruction.[6] Due process does not require that the jury in a capital case be instructed on every lesser-included offense supported by the evidence.[7]

Defendant has a due process right to have his or her theory of the case presented under proper instructions,[8] but the defendant has no federal due process right to have a state trial court give an instruction to the jury concerning the voluntariness of the defendant's confession.[9]

Errors in instructions do not always rise to the level of a denial of due process.[10] However, that does not mean that an instruction by itself may never rise to the level of constitutional error.[11] In assessing whether a jury instruction is unconstitutional, the inquiry is not whether the instruction is undesirable, erroneous, or even universally condemned but, rather, whether the ailing instruction by itself so affected the entire trial that the resulting conviction violates due process.[12] The instructions must be read as a whole, and a violation of due process cannot be found by picking an isolated statement out of context.[13] If the charge as a whole is ambiguous, the question is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the constitution.[14] Where an instruction does not deprive the accused of fundamental fairness, there is no deprivation of due process.[15]

Where statutes establish multiple methods of committing a single offense, principles of due process permit the court to instruct the jury in the disjunctive.[16] Where state law prescribes a range of possible punishment, to be fixed by the jury, it is a deprivation of liberty without due process for the state court to instruct the jury to impose a longer imprisonment than the least the jury is authorized to choose.[17]

The "Allen charge" does not necessarily deny due process,[18] but where such a charge is used to coerce the jury into reaching a verdict, it does violate due process.[19]

Capital sentencing instructions.

Due process requires that capital sentencing instructions clearly guide the jury in its understanding of mitigating circumstances and their purpose, and an option to recommend a life sentence, although aggravating circumstances are found.[20] Where the instructions do not clearly guide the jury in such understanding, due process is violated.[21] When a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, due process entitles the defendant to inform the jury of the defendant's parole ineligibility by a jury instruction.[22]

Self-defense.

A defendant has a due process right to a self-defense instruction if the evidence satisfies the requirements of the applicable law on self-defense.[23]

CUMULATIVE SUPPLEMENT

Cases:

Defendant had no due-process right to attend jury instruction conference, at his trial for being a felon in possession of a firearm; conference was devoted to purely legal issues concerning limiting instruction regarding government's intent to impeach defendant with prior bad acts evidence if he were to testify, and defendant made no argument that his presence would have

contributed to the fairness of the conference. U.S.C.A. Const.Amend. 5; Fed.Rules Evid.Rule 404(b), 28 U.S.C.A. U.S. v. Beierle, 810 F.3d 1193 (10th Cir. 2016).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Middleton v. McNeil, 541 U.S. 433, 124 S. Ct. 1830, 158 L. Ed. 2d 701 (2004).
Conn.—State v. Jacobson, 87 Conn. App. 440, 866 A.2d 678 (2005), judgment aff'd, 283 Conn. 618, 930 A.2d 628 (2007).
Wash.—State v. France, 121 Wash. App. 394, 88 P.3d 1003 (Div. 2 2004), on reconsideration, 129 Wash. App. 907, 120 P.3d 654 (Div. 2 2005).

2 Conn.—State v. T.R.D., 286 Conn. 191, 942 A.2d 1000 (2008).

3 U.S.—Dunn v. U. S., 442 U.S. 100, 99 S. Ct. 2190, 60 L. Ed. 2d 743 (1979).
Ga.—James v. State, 268 Ga. App. 851, 602 S.E.2d 854 (2004).

4 Ga.—James v. State, 268 Ga. App. 851, 602 S.E.2d 854 (2004).

5 U.S.—Bishop v. Mazurkiewicz, 634 F.2d 724 (3d Cir. 1980).
Provocation
A failure to sua sponte instruct first-degree manslaughter as lesser-included offense in a capital first-degree murder prosecution did not violate due process where there was no evidence of provocation that would warrant instruction on such crime.
U.S.—Thornburg v. Mullin, 422 F.3d 1113, 68 Fed. R. Evid. Serv. 188 (10th Cir. 2005).

6 U.S.—Hopper v. Evans, 456 U.S. 605, 102 S. Ct. 2049, 72 L. Ed. 2d 367 (1982); Darks v. Mullin, 327 F.3d 1001 (10th Cir. 2003).
N.C.—State v. Bellamy, 159 N.C. App. 143, 582 S.E.2d 663 (2003).

7 U.S.—Schad v. Arizona, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991).

8 Mich.—People v. Kurr, 253 Mich. App. 317, 654 N.W.2d 651 (2002).
Wash.—State v. O'Hara, 167 Wash. 2d 91, 217 P.3d 756 (2009), as corrected, (Jan. 21, 2010).
Wyo.—Holloman v. State, 2002 WY 117, 51 P.3d 214 (Wyo. 2002).

9 U.S.—McLallen v. Wyrick, 494 F. Supp. 138 (W.D. Mo. 1980).
Mo.—State v. Pughe, 428 S.W.2d 549 (Mo. 1968).

10 U.S.—La Brasca v. Misterly, 423 F.2d 708 (9th Cir. 1970).
Tex.—Ex parte Coleman, 599 S.W.2d 305 (Tex. Crim. App. 1978).

11 U.S.—Cupp v. Naughten, 414 U.S. 141, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973).
U.S.—Lee v. Henderson, 342 F. Supp. 561 (W.D. N.Y. 1972).

12 U.S.—Henderson v. Kibbe, 431 U.S. 145, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977).
Ark.—Hickman v. State, 372 Ark. 438, 277 S.W.3d 217 (2008).

13 U.S.—Martin v. Ohio, 480 U.S. 228, 107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987); Canaan v. McBride, 395 F.3d 376 (7th Cir. 2005).
Cal.—People v. Mills, 55 Cal. 4th 663, 147 Cal. Rptr. 3d 833, 286 P.3d 754 (2012).
Haw.—State v. Tyrrell, 60 Haw. 17, 586 P.2d 1028 (1978).
S.C.—Todd v. State, 355 S.C. 396, 585 S.E.2d 305 (2003).
Sympathy
An instruction during the penalty phase of a capital murder trial, that the jurors must not be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling," did not violate due process though the defendant alleged that a reasonable juror could interpret the instruction to prevent the juror from considering any "sympathy factor" raised by the evidence.
U.S.—California v. Brown, 479 U.S. 538, 107 S. Ct. 837, 93 L. Ed. 2d 934 (1987).

14 U.S.—Middleton v. McNeil, 541 U.S. 433, 124 S. Ct. 1830, 158 L. Ed. 2d 701 (2004).

15 Colo.—Constantine v. People, 179 Colo. 202, 499 P.2d 309 (1972).

Failure to instruct on subsidiary matters

Ark.—Tyler v. State, 265 Ark. 822, 581 S.W.2d 328 (1979).

16 Ill.—People v. Lee, 344 Ill. App. 3d 851, 280 Ill. Dec. 24, 801 N.E.2d 969 (1st Dist. 2003).

17 U.S.—Kelsie v. Trigg, 657 F.2d 155 (7th Cir. 1981).

18 U.S.—Shaffer v. Field, 484 F.2d 1196 (9th Cir. 1973).

Wis.—Kelley v. State, 51 Wis. 2d 641, 187 N.W.2d 810 (1971).

Modified *Allen* charge

U.S.—Gilbert v. Mullin, 302 F.3d 1166 (10th Cir. 2002).

19 U.S.—Hale v. U.S., 435 F.2d 737 (5th Cir. 1970).

S.C.—Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001).

20 U.S.—Gibson v. Zant, 547 F. Supp. 1270 (M.D. Ga. 1982), judgment aff'd, 705 F.2d 1543 (11th Cir. 1983).

21 U.S.—Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982).

22 U.S.—Kelly v. South Carolina, 534 U.S. 246, 122 S. Ct. 726, 151 L. Ed. 2d 670 (2002).

Due process violated

In capital case in which petitioner's future dangerousness was placed at issue through charging of continuing threat aggravator, trial court's refusal to give instruction explaining to jury distinguishing feature under Oklahoma law between life imprisonment and life imprisonment without parole, and its choice instead to affirmatively instruct jury that parole was not to be considered, violated petitioner's due process rights despite jury's failure to find continuing threat aggravator beyond reasonable doubt; due to trial court's response, jury was left to speculate about petitioner's parole eligibility when evaluating petitioner's future dangerousness and was denied straight answer about petitioner's parole eligibility even when it was requested.

U.S.—Mollett v. Mullin, 348 F.3d 902 (10th Cir. 2003).

23 U.S.—Lannert v. Jones, 321 F.3d 747, 60 Fed. R. Evid. Serv. 1339 (8th Cir. 2003).

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16C C.J.S. Constitutional Law § 1734

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XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

I. Trial

6. Instructions

§ 1734. Reasonable doubt; presumptions and burden of proof

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4638, 4639

In a criminal prosecution, due process requires that the jury be instructed that the prosecution must prove its case beyond a reasonable doubt. Where an instruction to the jury relating to a presumption may be interpreted as conclusive or as shifting the burden of proof or persuasion, such interpretation violates due process.

In a criminal prosecution, due process requires that the jury be instructed that the prosecution must prove its case beyond a reasonable doubt.[1] However, the Due Process Clause does not require that any particular form of words be used in advising the jury of the government's burden of proof.[2] Accordingly, characterizing reasonable doubt as "substantial doubt" or "not a mere possible doubt" does not violate due process.[3] The test of whether an instruction on reasonable doubt violates the right to due process is whether the instruction, taken as a whole, fairly and accurately conveys the meaning of reasonable doubt.[4] Accordingly, where an instruction adequately apprises the jury of a reasonable doubt standard, there is no denial of due process.[5] In this regard, omitting a definition of reasonable doubt in a jury instruction does not violate due process;[6] the United States Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course.[7]

Where an instruction to the jury relating to a presumption may be interpreted as conclusive or as shifting the burden of proof or persuasion, such interpretation violates due process.[8] Thus, an instruction requiring the defendant to establish by a preponderance of the evidence that the defendant acted in the heat of passion on sudden provocation is violative of due process.[9] However, due process is not denied where an instruction does not shift the burden of proof or relieve the prosecution of such burden.[10]

Generally, any instruction which permits a conviction on the basis of alternative theories not supported by the evidence runs afoul of the due process requirement that each juror's verdict be based on a theory of guilt in which the prosecution has proven each and every element beyond a reasonable doubt.[11]

An instruction regarding a permissible inference does not violate due process as long as the evidence necessary to raise the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt.[12]

While a jury instruction in a criminal case that the law presumes that a person intends the ordinary consequences of his or her voluntary acts violates due process, an instruction that merely permits a jury to infer that an accused intends such consequences of such acts is acceptable.[13] A jury instruction that in the absence of a reasonable explanation of the defendant's exclusive possession of recently stolen property, the jury may infer that the defendant obtained the possession by illegal means does not instruct the jury to infer the defendant's guilt in violation of the Due Process Clause.[14]

An instruction to effect that adverse inferences can be drawn if the accused who takes the stand fails to explain or deny evidence or facts against the accused which the accused can reasonably be expected to explain or deny does not violate due process.[15]

A long-standing and consistent judicial approval of an instruction, reflecting accumulated common experience, provides a strong indication that the instruction comports with due process but is not in itself sufficient to establish the instruction's constitutionality.[16]

CUMULATIVE SUPPLEMENT

Cases:

Erroneous jury instruction on conspiracy, which allowed jury to convict without finding the required elements of an overt act of a coconspirator, was fundamental error; instruction relieved State of its burden of proving every element of offense as required by due process, there was no conceivable strategy in which failing to object to instruction might have aided the defense, and instruction, as a whole, was misleading to jury. U.S. Const. Amend. 14. State v. Medina, 165 Idaho 501, 447 P.3d 949 (2019).

When a jury is instructed as to the statutory elements of a crime, that the State bears the burden of proving all elements beyond a reasonable doubt, and that the defendant has no burden of proof, the instructions as a whole are constitutionally adequate and do not violate due process. U.S. Const. Amend. 14. State v. Imokawa, 450 P.3d 159 (Wash. 2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Victor v. Nebraska, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994).

Col.—People v. Vanrees, 80 P.3d 840 (Colo. App. 2003), judgment rev'd on other grounds, 125 P.3d 403 (Colo. 2005).

Wash.—State v. Thomas, 166 Wash. 2d 380, 208 P.3d 1107 (2009).

2 U.S.—U.S. v. Clifton, 406 F.3d 1173, 67 Fed. R. Evid. Serv. 70 (10th Cir. 2005).

Md.—Carroll v. State, 202 Md. App. 487, 32 A.3d 1090 (2011), judgment aff'd, 428 Md. 679, 53 A.3d 1159 (2012).

Mass.—Com. v. Figueroa, 468 Mass. 204, 9 N.E.3d 812 (2014).

3 U.S.—Coleman v. Mitchell, 268 F.3d 417, 2001 FED App. 0367P (6th Cir. 2001).

4 U.S.—Hatheway v. Secretary of Army, 641 F.2d 1376 (9th Cir. 1981) (abrogated on other grounds by, High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990)).

Inadequate charge

Pa.—Com. v. Young, 456 Pa. 102, 317 A.2d 258 (1974).

Misunderstanding of instruction

Defendant has been denied due process of law if there exists a reasonable likelihood that the jury misunderstood the instructions to allow conviction on less than proof of guilt beyond a reasonable doubt.

D.C.—Holloway v. U.S., 25 A.3d 898 (D.C. 2011).

5 U.S.—Grace v. Butterworth, 635 F.2d 1 (1st Cir. 1980).

Pa.—Com. v. Boone, 287 Pa. Super. 1, 429 A.2d 689 (1981).

6 Mich.—People v. Allen, 466 Mich. 86, 643 N.W.2d 227 (2002).

7 Ark.—Clark v. State, 374 Ark. 292, 287 S.W.3d 567 (2008).

N.H.—State v. Germain, 165 N.H. 350, 79 A.3d 1025 (2013).

8 U.S.—Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979).

Ga.—Napier v. State, 276 Ga. 769, 583 S.E.2d 825 (2003).

Idaho—State v. Keaveny, 136 Idaho 31, 28 P.3d 372 (2001).

Ind.—Walgamuth v. State, 779 N.E.2d 533 (Ind. Ct. App. 2002).

Mental state

Jury instructions that shift to the defendant the burden of proof on a requisite element of mental state violate due process.

Ind.—Adkins v. State, 887 N.E.2d 934 (Ind. 2008).

Mont.—State v. McCaslin, 2004 MT 212, 322 Mont. 350, 96 P.3d 722 (2004) (overruled on other grounds by, State v. Herman, 2008 MT 187, 343 Mont. 494, 188 P.3d 978 (2008)).

9 U.S.—Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975).

10 U.S.—Cupp v. Naughten, 414 U.S. 141, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973).

11 Ky.—Mason v. Com., 331 S.W.3d 610 (Ky. 2011).

12 S.D.—State v. Cody, 293 N.W.2d 440 (S.D. 1980).

13 U.S.—U.S. v. Nelson, 277 F.3d 164 (2d Cir. 2002).

14 U.S.—U.S. v. DiGeronimo, 598 F.2d 746, 4 Fed. R. Evid. Serv. 796 (2d Cir. 1979).

Miss.—Robinson v. State, 418 So. 2d 749 (Miss. 1982).

Tenn.—Hall v. State, 552 S.W.2d 417 (Tenn. Crim. App. 1977).

15 Cal.—People v. Saddler, 24 Cal. 3d 671, 156 Cal. Rptr. 871, 597 P.2d 130 (1979).

16 U.S.—Barnes v. U.S., 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973).

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16C C.J.S. Constitutional Law § 1735

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§ 1735. Reasonable doubt; presumptions and burden of proof—Innocence

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West's Key Number Digest

West's Key Number Digest, Constitutional Law 4638

The Due Process Clause does not absolutely require that an instruction on the presumption of innocence be given in every criminal case.

An instruction on the presumption of innocence may be given under the due process requirements of a fair trial,[1] and it has been said that due process requires that the jury be instructed that the prosecution must establish its case beyond a reasonable doubt[2] and that the defendant be presumed innocent.[3] However, while a court's failure to give requested instructions on the presumption of innocence may result in the violation of defendant's right to a fair trial as guaranteed by the Due Process Clause,[4] the Due Process Clause does not absolutely require that an instruction on the presumption of innocence must be given in every criminal case.[5]

Footnotes

1 U.S.—Coleman v. Paderick, 382 F. Supp. 253 (E.D. Va. 1974).

2 As to reasonable doubt instructions, generally, see § 1734.

3 Wash.—State v. Thomas, 166 Wash. 2d 380, 208 P.3d 1107 (2009).

4 U.S.—Taylor v. Kentucky, 436 U.S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978).

5 U.S.—Kentucky v. Whorton, 441 U.S. 786, 99 S. Ct. 2088, 60 L. Ed. 2d 640 (1979).
Cal.—People v. Aranda, 55 Cal. 4th 342, 145 Cal. Rptr. 3d 855, 283 P.3d 632 (2012).
Ind.—McCowan v. State, 27 N.E.3d 760 (Ind. 2015).
Mass.—Com. v. Drayton, 386 Mass. 39, 434 N.E.2d 997 (1982).

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XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

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Research References

A.L.R. Library

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West's A.L.R. Digest, Constitutional Law 4700, 4702, 4705 to 4709, 4716, 4718, 4725, 4726, 4729, 4731 to 4735, 4742 to 4746

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16C C.J.S. Constitutional Law § 1736

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

1. In General

§ 1736. General due process requirements regarding judgment, sentencing, and punishment

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4700, 4745

A judgment rendered without due process against a person accused of a crime is void, and a state must give one whom it deprives of his or her freedom the opportunity to open an inquiry into the intrinsic fairness of the criminal process.

The concern that no one be deprived of his or her liberty without due process of law is a paramount consideration in the administration of justice, but that concern does not completely override all considerations of finality of judgments and of respect for legal and orderly procedures.[1] A person who has been proven guilty beyond a reasonable doubt at a criminal trial conducted in accordance with relevant constitutional guarantees may be assessed the punishment authorized by statute for his or her offense as long as that penalty is not cruel and unusual or based on some arbitrary distinction that would violate the due process clause of either the federal or the state constitution.[2] On the other hand, a judgment rendered without due process against a person accused of a crime of law is void.[3] Due process precludes imprisonment upon a constitutionally infirm judgment of conviction and demands correction when such occurs.[4] Thus, a state generally must give one whom it deprives of his or her freedom the opportunity to open an inquiry into the intrinsic fairness of the criminal process even though the process appears proper on the surface.[5]

Informing jury of capital defendant's parole eligibility.

When a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without the possibility of parole, due process entitles the defendant to inform the jury of his or her parole ineligibility either by jury instruction or in arguments by counsel.[6] Thus, under a capital sentencing scheme, pursuant to which the jury has no choice other than to recommend a sentence either of death or of life imprisonment, on finding the presence of a statutory aggravator, due process requires that the jury must be informed that a life sentence carries no possibility of parole.[7]

Sentencing by jury.

If a state concludes that jury sentencing is preferable, nothing in the Due Process Clause intrudes upon that choice.[8] Thus, states may, without violating due process, require the jury to choose the punishment[9] except where there is a plea of guilty dispensing with the necessity of a jury trial[10] or where the accused is convicted by a confession.[11]

Determination of facts on which sentence is based.

A statute which allows a judge to make a factual determination, based on a preponderance of the evidence, which would increase the maximum sentence of a defendant convicted of a second-degree offense of unlawful possession of a prohibited weapon, thereby imposing a punishment identical to that imposed by statute for a first-degree crime, violates due process.[12] The Due Process Clause requires that such factual determinations be made by a jury on the basis of proof beyond a reasonable doubt.[13]

CUMULATIVE SUPPLEMENT

Cases:

Murder defendant's due process rights were not violated by delay of more than 17 years between conviction and imposition of sentence of death; prior testimony was preserved, absences and lapses in memory had not been shown to involve identifiable exculpatory, mitigating, or even helpful information, and in the end, defendant did not demonstrate legal prejudice. U.S.C.A. Const.Amend. 14. Com. v. Smith, 131 A.3d 467 (Pa. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Ky.—Vickery v. Lady, 264 S.W.2d 683 (Ky. 1953).
Pa.—Com. ex rel. Elliott v. Baldi, 373 Pa. 489, 96 A.2d 122 (1953).
Due process requirements
Before the government can impose severe civil and criminal penalties, due process entitles a defendant to a full and fair hearing before an impartial tribunal at a meaningful time and in a meaningful manner.
U.S.—Tennessee Valley Authority v. Whitman, 336 F.3d 1236 (11th Cir. 2003).

2 § 1736.

3 U.S.—Houston v. Eidson, 119 F. Supp. 778 (W.D. Mo. 1954).
Iowa—Sewell v. Lainson, 244 Iowa 555, 57 N.W.2d 556 (1953).
Nev.—State v. Boatwright, 2014 WL 1922578 (Nev. 2014).

4 Nev.—Summers v. Warden of Nev. State Prison, 84 Nev. 326, 440 P.2d 388 (1968).

As to the correction of sentences, generally, see § 1749.

Vague and uncertain judgment

U.S.—Perkins v. Peyton, 369 F.2d 590 (4th Cir. 1966).

5 U.S.—Carter v. People of State of Illinois, 329 U.S. 173, 67 S. Ct. 216, 91 L. Ed. 172 (1946).

Ill.—Thompson v. People, 410 Ill. 256, 102 N.E.2d 315 (1951).

As to due process in connection with vacating and setting aside a judgment, generally, see § 1779.

Duty of State to provide postconviction corrective process

U.S.—Edwards v. Virginia State Dept. of Corrections, 462 F. Supp. 164 (W.D. Va. 1978).

A.L.R. Library

"Guilty but mentally ill" statutes: validity and construction, 71 A.L.R.4th 702.

6 U.S.—Kelly v. South Carolina, 534 U.S. 246, 122 S. Ct. 726, 151 L. Ed. 2d 670 (2002).

Ariz.—State v. Hardy, 230 Ariz. 281, 283 P.3d 12 (2012), cert. denied, 133 S. Ct. 935, 184 L. Ed. 2d 732 (2013).

As to the death penalty, generally, see § 1742.

7 Cal.—People v. Cortez, 18 Cal. 4th 1223, 77 Cal. Rptr. 2d 733, 960 P.2d 537 (1998).

8 U.S.—Chaffin v. Stynchcombe, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973).

9 Cal.—People v. Rocha, 80 Cal. App. 3d 972, 146 Cal. Rptr. 81 (1st Dist. 1978).

Fla.—Dean v. State, 265 So. 2d 15 (Fla. 1972).

Ill.—People v. Lewis, 88 Ill. 2d 129, 58 Ill. Dec. 895, 430 N.E.2d 1346 (1981).

Province of judge

Jury sentencing does not violate due process by invading the province of the judge.

U.S.—Bell v. Patterson, 279 F. Supp. 760 (D. Colo. 1968), judgment aff'd, 402 F.2d 394 (10th Cir. 1968).

Suspension or probation by court

A method of sentencing in a jury trial, which permits the jury to impose sentence and allows the trial judge to suspend that sentence or place the defendant on probation, does not violate due process.

U.S.—Roman v. Parrish, 328 F. Supp. 882 (E.D. Va. 1971).

Application of statute impermissible

Application of a statute under which a prospective juror was disqualified, unless he or she stated under oath that a mandatory penalty of death or imprisonment for life would not affect his or her deliberations on any issue of fact, was impermissible under the Fourteenth Amendment to the extent that the test could, and did, exclude jurors who stated that they would be "affected" by the possibility of the death penalty but who apparently meant only that the consequences of their decision would invest their deliberations with greater seriousness or gravity or would involve them emotionally or who were unable to positively state whether or not their deliberations would be in any way "affected."

U.S.—Adams v. Texas, 448 U.S. 38, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980).

10 Mo.—State v. Williams, 320 Mo. 296, 6 S.W.2d 915 (1928).

11 Md.—Abbott v. State, 188 Md. 310, 52 A.2d 489 (1947).

12 U.S.—Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

13 U.S.—Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

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16C C.J.S. Constitutional Law § 1737

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Constitutional Law
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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

1. In General

§ 1737. Statutory basis for sentencing

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4700

The legislature has wide discretion to prescribe penalties for defined offenses, subject to the due process consideration of whether the statute in question is reasonably designed to remedy the evils determined to be a threat to the public health, safety, and general welfare, and a person who has been proven guilty beyond a reasonable doubt at a criminal trial conducted in accordance with relevant constitutional guarantees may be assessed the punishment authorized by statute for his or her offense.

As a general rule, the legislature has a wide discretion to prescribe penalties for defined offenses, subject to the due process consideration of whether the statute in question is reasonably designed to remedy the evils determined to be a threat to the public health, safety, and general welfare.[1] Thus, each state may prescribe the kind[2] as well as the time or duration and extent of punishment[3] for violation of its laws, without violation of the guaranty of due process of law. Consequently, where a sentence is one that has been established by the legislature and is not on its face cruel and unusual, it generally will be sustained when attacked on due process grounds.[4] That is, a person who has been proven guilty beyond a reasonable doubt at a criminal trial conducted in accordance with relevant constitutional guarantees may be assessed the punishment authorized by statute for his

or her offense so long as that penalty is not cruel and unusual or not based on some arbitrary distinction that would violate the due process clause of either the federal or the state constitution.[5]

The Due Process Clause does not require a state to fix or impose any particular penalty for any crime it may define[6] or to impose the same or proportionate sentences for separate and independent crimes.[7] Due process is not violated by prescribing a more severe punishment for one offense than is prescribed for similar crimes or crimes of equally serious import.[8] For example, legislatures may classify various drug offenses and prescribe harsher penalties than are imposed for other serious crimes, without violating due process.[9]

States may choose a class of offenders for unequal treatment without violating an accused's due process rights provided that there is a rational nexus between the classification and a valid legislative purpose.[10] However, a state may not make different punishments follow the same identical criminal acts in different political subdivisions of the State.[11]

In general, consistently with due process, a state may provide for consecutive sentences[12] or cumulative sentences.[13]

For federal and state constitutional substantive due process purposes, it is permissible for the trial court to impose whatever treatment plan it concludes is most likely to be effective for the particular delinquent child as long as that plan does not pose a significant threat to the health or well-being of the child.[14]

Footnotes

1 Ill.—People v. Pace, 100 Ill. App. 3d 213, 55 Ill. Dec. 658, 426 N.E.2d 983 (1st Dist. 1981).

2 U.S.—Duffy v. Wells, 201 F.2d 503 (9th Cir. 1952).
N.J.—Ex parte Zienowicz, 12 N.J. Super. 563, 79 A.2d 912 (County Ct. 1951).

3 U.S.—Hall v. McKenzie, 575 F.2d 481 (4th Cir. 1978).
Ill.—People v. Pace, 100 Ill. App. 3d 213, 55 Ill. Dec. 658, 426 N.E.2d 983 (1st Dist. 1981).
Minn.—Bangert v. State, 282 N.W.2d 540 (Minn. 1979).

4 Fla.—State v. Bailey, 360 So. 2d 772 (Fla. 1978).
As to cruel and unusual punishment, generally, see § 1741.

5 Kan.—State v. Wilkinson, 269 Kan. 603, 9 P.3d 1 (2000).

6 U.S.—Williams v. State of Okl., 358 U.S. 576, 79 S. Ct. 421, 3 L. Ed. 2d 516 (1959).
Okla.—Love v. State, 1969 OK CR 16, 449 P.2d 729 (Okla. Crim. App. 1969).

7 U.S.—Williams v. State of Okl., 358 U.S. 576, 79 S. Ct. 421, 3 L. Ed. 2d 516 (1959).
Okla.—Love v. State, 1969 OK CR 16, 449 P.2d 729 (Okla. Crim. App. 1969).
As to equal protection considerations with respect to sentencing and punishment, generally, see § 1352.

8 Cal.—People v. Kingston, 44 Cal. App. 3d 629, 118 Cal. Rptr. 896 (2d Dist. 1974).
La.—State v. Pebworth, 260 La. 647, 257 So. 2d 136 (1972).
N.J.—State v. Hampton, 61 N.J. 250, 294 A.2d 23 (1972).

9 U.S.—U.S. v. Erwin, 602 F.2d 1183 (5th Cir. 1979).
Ill.—James v. Illinois., 429 U.S. 1082, 97 S. Ct. 1087, 51 L. Ed. 2d 528 (1977).
Mo.—State v. Golightly, 495 S.W.2d 746 (Mo. Ct. App. 1973).

10 Mich.—People v. Jackson, 80 Mich. App. 244, 263 N.W.2d 44 (1977).
N.J.—State v. Fearick, 69 N.J. 32, 350 A.2d 227 (1976).
Ohio—City of Cincinnati v. Wakim, 67 Ohio Op. 2d 65, 322 N.E.2d 345 (Ct. App. 1st Dist. Hamilton County 1974).

11 Kan.—State ex rel. White v. Board of Com'rs of Wyandotte County, 140 Kan. 744, 39 P.2d 286 (1934).
Tex.—Ex parte Sizemore, 110 Tex. Crim. 232, 8 S.W.2d 134, 59 A.L.R. 430 (1928).

12 U.S.—Fierro v. MacDougall, 648 F.2d 1259 (9th Cir. 1981).
Ind.—Bish v. State, 421 N.E.2d 608 (Ind. 1981).
Wash.—State v. Taylor, 22 Wash. App. 308, 589 P.2d 1250 (Div. 1 1979).

Mandatory consecutive sentence

A state statute requiring consecutive sentences to be imposed on all persons who commit crimes while under state sentences did not violate the Fourteenth Amendment on the theory that it took away the state trial courts' discretion to consider concurrent sentences.

U.S.—Stephens v. Wyrick, 659 F.2d 94 (8th Cir. 1981).

13 U.S.—U.S. ex rel. Laird v. O'Brien, 111 F.2d 232 (C.C.A. 7th Cir. 1940).

14 Fla.—P.W.G. v. State, 702 So. 2d 488 (Fla. 1997).

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16C C.J.S. Constitutional Law § 1738

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

1. In General

§ 1738. Nature and extent of sentence

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4700, 4702

A state may, without violating due process, confer on the court the power to fix the nature and extent of the punishment within certain limits prescribed by statute.

A state may, without violating due process, confer on the court the power to fix the nature and extent of the punishment within certain limits prescribed by statute.[1] While due process protects against arbitrary and discriminatory application of criminal sanctions, it nonetheless permits courts to exercise wide discretion in selecting appropriate sentences.[2] Similarly, prosecutorial discretion to select those eligible cases in which the death penalty will actually be sought does not, in and of itself, evidence an arbitrary and capricious capital punishment system or offend principles of equal protection, due process, or cruel and unusual punishment.[3]

A sentence rendered within the statutory limits is not, absent an abuse of discretion, violative of due process.[4] However, the guaranty of due process of law is violated by the imposition by the court of a sentence beyond its jurisdiction to pronounce[5] as

where a court subjects an individual to sanctions not provided for, or contemplated by, the legislature[6] or imposes two sentences for one offense.[7]

Since the matter of sentences involves individual judgment and individual factors, the fact that a codefendant receives a less severe sentence than the defendant does not violate due process,[8] and the defendant is not punished, in violation of due process, for asserting his or her right to a trial because a codefendant, who pleaded guilty, has received a lighter sentence.[9] Likewise, the practice of a state court in taking into consideration, in sentencing an accomplice, his or her aid to the State in turning State's evidence is not a denial of due process to a convicted confederate.[10] Nonetheless, unequal punishment for the identical conduct may be considered as violative of due process.[11]

A judge does not violate an accused's right to due process by considering, in sentencing, his or her personal opinion that the accused intentionally and deliberately lied in his or her testimony in the case.[12] Furthermore, due process is not denied by the court's taking into account in its sentencing decision the fact that accused would not admit the commission of the offense of which he or she has been found guilty.[13]

Where a sentence imposed on accused is proper according to the statute applicable at the time of sentencing, accused is not denied due process by the fact that a lesser sentence is specified in a statute which becomes effective thereafter.[14] Moreover, an accused convicted of an offense similar to an offense prohibited by a newly enacted statute is not denied due process by being sentenced under the new statute where the statute so provides.[15]

Sentencing following guilty plea.

In general, no due process question exists so long as a plea of guilty leads to a punishment which is within that prescribed for the crime charged.[16] Due process is not denied by a court's imposition, subsequent to its acceptance of a guilty plea, of a sentence harsher than that recommended by a plea agreement between the prosecution and accused.[17] Similarly, the judge's failure to affirmatively explain on the record the reasons for a more severe sentence than was proposed in a plea agreement, which the defendant rejected, does not violate due process in the absence of evidence indicating judicial vindictiveness.[18]

The judge's willingness to accept a plea bargain does not establish that his or her refusal to grant leniency after trial constitutes an unconstitutional denial of due process by punishing an accused for exercising his or her right to trial.[19] Likewise, the imposition of a sentence contrary to the judge's own expressed promise violates due process.[20]

Footnotes

1 U.S.—U. S. ex rel. Collins v. Claudy, 204 F.2d 624 (3d Cir. 1953).
Ohio—In re Smith, 162 Ohio St. 58, 54 Ohio Op. 10, 120 N.E.2d 736 (1954).
Limitations on punishment for related offenses
(1) Congress has the power to create separate and distinct offenses growing out of the same act, but whenever it appears that proof of one offense proves every essential element of another growing out of same act, the Fifth Amendment limits punishment to a single act.
U.S.—Freeman v. U.S., 146 F.2d 978 (C.C.A. 6th Cir. 1945).
(2) A defendant's due process rights were not violated by a statute that imposed a more severe penalty for child molestation based on acts of sodomy than for child molestation based on other acts since the general assembly could reasonably have concluded that the psychological well-being of minors was more damaged by acts of sodomy than by acts of intercourse.

Ga.—Odett v. State, 273 Ga. 353, 541 S.E.2d 29 (2001).

2 Wash.—State v. Jacobsen, 78 Wash. 2d 491, 477 P.2d 1 (1970).

Punishment as felony or misdemeanor

The punishment provision of a statute, creating an indictable misdemeanor and giving a judge discretion in punishing as felony or misdemeanor, did not violate the due process clause.

Ill.—People v. Houston, 21 Ill. App. 3d 209, 315 N.E.2d 192 (1st Dist. 1974).

3 S.D.—State v. Moeller, 2000 SD 122, 616 N.W.2d 424 (S.D. 2000).

As to cruel and unusual punishment, generally, see § 1741.

As to the death penalty, generally, see § 1742.

4 U.S.—U.S. v. Small, 636 F.2d 126 (5th Cir. 1981).

N.M.—State v. Wilson, 97 N.M. 534, 1982-NMCA-019, 641 P.2d 1081 (Ct. App. 1982).

N.C.—State v. Conard, 55 N.C. App. 63, 284 S.E.2d 557 (1981).

Pa.—Com. v. Corson, 298 Pa. Super. 51, 444 A.2d 170 (1982).

Finding of aggravating circumstances

A trial court may, without violating due process rights, find aggravating circumstances in a presentence report and increase the presumptive sentence even though the prosecutor does not allege aggravating circumstances with specific facts constituting aggravation.

Ariz.—State v. Ford, 125 Ariz. 8, 606 P.2d 826 (Ct. App. Div. 2 1979).

As to enhanced or extended sentences, see § 1743.

5 Tex.—Ex parte Quintanilla, 151 Tex. Crim. 328, 207 S.W.2d 377 (1947).

Prohibition of more severe sentence following remand

The "sentence previously imposed," within the meaning of the due process and statutory prohibitions against a more severe sentence on remand, is the sentence that first came from the mouth of the sentencing judge, right or wrong, lawful or unlawful, constitutional or unconstitutional, and not the subsequent fate of that sentence, as it may have been cut or trimmed or shaped or in any way reformed by ex post facto appellate analysis.

Md.—Dixon v. State, 133 Md. App. 325, 755 A.2d 560 (2000), judgment rev'd on other grounds, 364 Md. 209, 772 A.2d 283 (2001).

6 U.S.—Hill v. Estelle, 653 F.2d 202 (5th Cir. 1981); U. S. ex rel. Jenkins v. Zelker, 337 F. Supp. 925 (S.D. N.Y. 1972).

Minn.—State v. Minton, 276 Minn. 213, 149 N.W.2d 384 (1967).

7 Neb.—State v. Huffman, 186 Neb. 809, 186 N.W.2d 715 (1971).

8 Ill.—People v. Horton, 47 Ill. App. 3d 915, 8 Ill. Dec. 239, 365 N.E.2d 477 (1st Dist. 1977).

Mo.—Dorsey v. State, 586 S.W.2d 810 (Mo. Ct. App. E.D. 1979).

Neb.—State v. Kramer, 203 Neb. 658, 279 N.W.2d 634 (1979).

9 U.S.—De La Motte v. U.S., 462 F.2d 124 (3d Cir. 1972); U.S. v. Garrison, 527 F.2d 998 (8th Cir. 1975).

Ill.—People v. Gregory, 43 Ill. App. 3d 1052, 2 Ill. Dec. 808, 357 N.E.2d 1251 (1st Dist. 1976).

10 U.S.—Lisenba v. People of State of California, 314 U.S. 219, 62 S. Ct. 280, 86 L. Ed. 166 (1941).

11 D.C.—Palmore v. U. S., 290 A.2d 573 (D.C. 1972), judgment aff'd, 411 U.S. 389, 93 S. Ct. 1670, 36 L. Ed. 2d 342 (1973).

12 Ohio—State v. Stewart, 70 Ohio App. 2d 147, 24 Ohio Op. 3d 198, 435 N.E.2d 426 (5th Dist. Licking County 1980).

13 U.S.—U. S. v. Grayson, 438 U.S. 41, 98 S. Ct. 2610, 57 L. Ed. 2d 582 (1978).

14 U.S.—Meeks v. Jago, 548 F.2d 134 (6th Cir. 1976); Mirenda v. Ulibarri, 351 F. Supp. 676 (C.D. Cal. 1972).

Ariz.—State v. Ferrell, 126 Ariz. 1, 612 P.2d 52 (1980).

15 Mich.—People v. Auer, 393 Mich. 667, 227 N.W.2d 528 (1975).

16 Ala.—Poole v. State, 44 Ala. App. 169, 204 So. 2d 564 (1967).

As to due process with respect to a plea of guilty, generally, see § 1645.

17 Ill.—People v. Lambrechts, 41 Ill. App. 3d 729, 355 N.E.2d 53 (2d Dist. 1976), judgment aff'd, 69 Ill. 2d 544, 14 Ill. Dec. 445, 372 N.E.2d 641 (1977).

18 U.S.—U.S. v. Lippert, 740 F.2d 457 (6th Cir. 1984).

19 Mo.—State v. Davis, 582 S.W.2d 342 (Mo. Ct. App. E.D. 1979).

20 U.S.—U. S. ex rel. Elksnis v. Gilligan, 256 F. Supp. 244 (S.D. N.Y. 1966).

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16C C.J.S. Constitutional Law § 1739

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

1. In General

§ 1739. Costs and fines

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4704, 4716, 4736

Due process generally requires notice and a hearing before costs may be imposed, and where a fine is imposed as a punishment for a crime, it may not be so grossly excessive as to amount to a deprivation of property without due process.

Due process generally requires that a defendant be afforded notice that costs may be imposed[1] and that the defendant be given an opportunity to be heard on whether the imposition of such a requirement is appropriate.[2] However, a statute providing for the taxing of costs against a convicted defendant does not deny due process for the failure to provide for a hearing prior to the entry of judgment for the costs, since the court may conduct a hearing to the extent necessary, in the event of an objection to the judgment.[3]

The imprisonment of an indigent solely for nonpayment of a fine violates due process.[4] Thus, before defendant can be incarcerated for nonpayment of fine, due process ordinarily requires an inquiry into the defendant's financial condition and ability to raise the money to pay the fine.[5] Moreover, the imprisonment of indigent prisoners for additional periods as a result of their failure to pay court costs is a violation of due process even where their indigent status is not established until after

sentencing.[6] On the other hand, the imposition of a fine with an additional order that the defendant stand committed until the fine is paid does not violate due process, absent an indication that the defendant is indigent or otherwise unable to pay the fine.[7] Also, if an offender does not make sufficient bona fide efforts to seek employment or borrow money in order to pay, the State may imprison the offender for failing to pay his or her legal financial obligation.[8]

Where a fine is imposed as a punishment for a crime, it may not be so grossly excessive as to amount to a deprivation of property without due process.[9] Moreover, due process is violated by the imposition of a fine in violation of what is allowable under the governing statute.[10]

Strict liability.

A statute defining an offense malum prohibitum may impose a fine and/or imprisonment on a strict liability basis without offending due process of law.[11]

Footnotes

1 Or.—Stacey v. State, 30 Or. App. 1075, 569 P.2d 640 (1977).

2 Or.—Stacey v. State, 30 Or. App. 1075, 569 P.2d 640 (1977).
Pa.—Com. v. Hower, 267 Pa. Super. 182, 406 A.2d 754 (1979).

3 Ill.—People v. Estate of Scott, 66 Ill. 2d 522, 6 Ill. Dec. 876, 363 N.E.2d 823 (1977).

4 U.S.—U.S. v. Levenson, 524 F. Supp. 781 (S.D. N.Y. 1981).

5 Conn.—Allen v. Warden, Community Correctional Center, 31 Conn. Supp. 459, 334 A.2d 488 (Super. Ct. 1975).

6 La.—State v. Barnes, 496 So. 2d 1056 (La. Ct. App. 4th Cir. 1986).

7 U.S.—U.S. v. Miller, 588 F.2d 1256 (9th Cir. 1978).

8 Wash.—State v. Nason, 168 Wash. 2d 936, 233 P.3d 848 (2010).

9 Vt.—State v. Diamondstone, 132 Vt. 303, 318 A.2d 654 (1974).
Fines not greatly disproportionate to offense
Ill.—People v. Graves, 235 Ill. 2d 244, 335 Ill. Dec. 881, 919 N.E.2d 906 (2009).
Fines not obviously unreasonable
Fines that were nearly double the amount of unreported campaign contributions by groups subject to a statute regulating such contributions were not obviously unreasonable and did not violate due process.
Alaska—VECO Intern., Inc. v. Alaska Public Offices Com'n, 753 P.2d 703 (Alaska 1988).
Factors considered in setting amount of restitution fine
Losses suffered by the victim are but one factor a trial court may consider in setting the amount of a restitution fine; other considerations include the seriousness and gravity of the offense, the circumstances of its commission, and any economic gain derived by the defendant as a result of the crime.
Cal.—People v. Wyman, 166 Cal. App. 3d 810, 212 Cal. Rptr. 668 (3d Dist. 1985).

10 Tex.—Azeez v. State, 248 S.W.3d 182 (Tex. Crim. App. 2008).

11 D.C.—McNeely v. U.S., 874 A.2d 371 (D.C. 2005).

16C C.J.S. Constitutional Law § 1740

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Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

1. In General

§ 1740. Credit for time in custody

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4707

Due process does not necessarily require a court to credit presentence jail time against the sentence imposed upon conviction for an offense; however, it has also been held that a trial court's failure to award proper credit for presentence confinement results in an illegal sentence and violates the defendant's right to due process of law.

Due process does not necessarily require a court to credit presentence jail time against the sentence imposed upon conviction for an offense.[1] However, according to some authority, the failure to credit prisoners' statutory maximum and mandatory minimum terms with time served in detention prior to trial, conviction, and sentencing may violate their rights to due process,[2] and it has been held that a trial court's failure to award proper credit for presentence confinement results in an illegal sentence and violates the defendant's right to due process of law.[3]

When a sentencing judge considers the time spent by an indigent defendant in jail pending trial, without specifically crediting the time, but imposes a sentence which, if increased by the jail time, would not exceed the maximum sentence allowed by law, due process is not violated by reason of the defendant's inability to give a bond.[4]

Where the current conviction arises out of the same criminal transaction as a prior invalid conviction, failure to give a prisoner credit for the time served under the prior invalid sentence violates due process.[5]

Footnotes

1 U.S.—Brinkman v. Schubert, 422 F. Supp. 820 (W.D. Wis. 1976).
Mo.—State v. Crockrell, 470 S.W.2d 507 (Mo. 1971).
Ohio—State v. Little, 34 Ohio App. 2d 121, 63 Ohio Op. 2d 204, 296 N.E.2d 574 (8th Dist. Cuyahoga County 1973).
As to equal protection considerations with respect to credit for time served, see § 1356.
As to a parolee's due process rights with respect to time spent on parole, generally, see § 1782.

2 Wash.—Reanier v. Smith, 83 Wash. 2d 342, 517 P.2d 949 (1974).

3 Wyo.—Daniels v. State, 2014 WY 125, 335 P.3d 483 (Wyo. 2014).

4 Kan.—Hazelwood v. State, 215 Kan. 442, 524 P.2d 704 (1974).

5 U.S.—Patton v. State of N.C., 381 F.2d 636 (4th Cir. 1967).
Plea bargain
Where a defendant is charged with a number of offenses, and he or she enters into a plea bargain that is set aside for reasons of unconstitutional process employed in taking the plea, and the defendant then enters into a second plea bargain involving the same charges, he or she is entitled to credit for time spent in prison pursuant to the first plea bargain under the due process clause even though the precise counts to which he or she pleaded guilty in each bargain were not same.
Cal.—People v. Schuler, 76 Cal. App. 3d 324, 142 Cal. Rptr. 798 (1st Dist. 1977).

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16C C.J.S. Constitutional Law § 1741

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

1. In General

§ 1741. Cruel and unusual punishment

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4700, 4702, 4742

The Eighth Amendment ban on cruel and unusual punishment is applicable to the states through the Due Process Clause of the Fourteenth Amendment, and whether particular penalties violate due process depends on an analysis of the applicability of such ban on cruel and unusual punishment.

In general, the Eighth Amendment ban on cruel and unusual punishment is applicable to the states through the Due Process Clause of the Fourteenth Amendment.[1] Whether particular penalties, such as imprisonment for life,[2] or for a term of years,[3] do or do not violate due process depends on an analysis of the applicability of the ban on cruel and unusual punishment.

Similarly, the imposition of the death penalty may[4] or may not[5] violate the Due Process Clause of the Fourteenth Amendment, depending on whether or not it violates the Eighth Amendment ban on cruel and unusual punishment.

A statutory scheme for determining whether the death penalty is warranted does not violate a defendant's constitutional rights to due process and freedom from cruel and unusual punishment as a jury's decision that the death sentence is warranted is not the same as deciding that it is to be imposed.[6] Likewise, a deliberation scheme whereby the jury in the penalty phase of a

capital murder trial must first find that aggravating circumstances are sufficient to warrant the imposition of the death penalty, before balancing mitigating circumstances against aggravating circumstances, does not impermissibly shift the burden of proof to the defendant, thereby violating the defendant's rights to due process, a trial by jury, and freedom from cruel and unusual punishment.[7] A jury's decision that the death penalty is warranted is not the same as its deciding that it must be imposed, and such an order of proceedings actually presents an advantage to the defendant by requiring the State to completely prove its aggravating case before allowing the jury to even consider application of the death penalty.[8]

Footnotes

1 U.S.—Hutto v. Finney, 437 U.S. 678, 98 S. Ct. 2565, 57 L. Ed. 2d 522 (1978).
Or.—State v. Guzek, 322 Or. 245, 906 P.2d 272 (1995).
Wash.—In re Boot, 130 Wash. 2d 553, 925 P.2d 964 (1996).
As to incorporation of the Bill of Rights in the Fourteenth Amendment, generally, see § 1837.
Due process clause of state constitution
Conn.—State v. Rizzo, 303 Conn. 71, 31 A.3d 1094 (2011).

2 U.S.—Helm v. Solem, 684 F.2d 582 (8th Cir. 1982), judgment aff'd, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983).
Ind.—Walker v. State, 269 Ind. 346, 381 N.E.2d 88 (1978).
N.Y.—People v. Ellison, 78 Misc. 2d 652, 357 N.Y.S.2d 773 (County Ct. 1974).

3 Ind.—Bumgardner v. State, 422 N.E.2d 1244 (Ind. 1981).
N.J.—State v. Hampton, 61 N.J. 250, 294 A.2d 23 (1972).
S.D.—State v. Holtry, 321 N.W.2d 530 (S.D. 1982).
Tenn.—Williams v. State, 491 S.W.2d 862 (Tenn. Crim. App. 1972).

4 U.S.—Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980).
Va.—Whitley v. Com., 223 Va. 66, 286 S.E.2d 162 (1982).
As to due process in connection with the imposition of the death penalty, generally, see § 1742.
Consideration of evolving standards
The district court could not look to "evolving standards" when analyzing whether the Federal Death Penalty Act violated the Due Process Clause inasmuch as it was the Eighth Amendment, rather than the Due Process Clause, that required consideration of "evolving standards" in determining whether a particular punishment conformed to the principles of decency marking the progress of a maturing society.
U.S.—U.S. v. Quinones, 313 F.3d 49 (2d Cir. 2002).
Fourteenth Amendment violated
The Fourteenth Amendment was violated by imposition of the death penalty on a person who aided and abetted a felony in the course of which murder was committed by others but who did not himself kill, attempt to kill, intend to kill, or contemplate that life would be taken.
Del.—State v. Rodriguez, 656 A.2d 262 (Del. Super. Ct. 1993).
Delay in outlining mitigation findings
A procedural delay which occurred when the trial court failed to file a separate opinion outlining its mitigation findings within 15 days after sentencing a defendant to death did not deprive the defendant of due process of law or subject him to cruel and unusual punishment; the delay did not adversely affect the defendant's motion for a new trial, as this motion was filed only five days after trial court entered its sentence, did not prejudice the defendant's rights on appeal where the trial court filed the requisite findings shortly after it ruled on the defendant's motion for new trial, and did not constitute cruel and unusual punishment, in that the defendant was imprisoned pursuant to the trial court's sentence, not pursuant to its separate findings concerning its consideration of the mitigation factors.
Ohio—State v. Martin, 19 Ohio St. 3d 122, 483 N.E.2d 1157 (1985).

5 U.S.—Richmond v. Arizona, 434 U.S. 1323, 98 S. Ct. 8, 54 L. Ed. 2d 34 (1977); Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981); Knapp v. Cardwell, 667 F.2d 1253 (9th Cir. 1982).
Colo.—People v. Rodriguez, 914 P.2d 230 (Colo. 1996), as modified on denial of reh'g, (Apr. 15, 1996).

Ga.—Horton v. State, 249 Ga. 871, 295 S.E.2d 281 (1982).

6 Mo.—State v. Middleton, 998 S.W.2d 520 (Mo. 1999).

No violation of prohibition against cruel and unusual punishment

(1) A death-penalty scheme requiring at least 10 votes for the jury to return a negative answer to the future-dangerousness special issue and to return an affirmative answer on the mitigation issue did not violate either due process or the prohibition of cruel and unusual punishment.

Tex.—Murphy v. State, 112 S.W.3d 592 (Tex. Crim. App. 2003).

(2) A section of a death penalty statute under which the defendant must be sentenced to death if the capital sentencing jury determines that there are no mitigating factors sufficient to preclude imposition of the death sentence does not violate the rights of defendants to due process and to be free from cruel and unusual punishment.

Ill.—People v. Macri, 185 Ill. 2d 1, 235 Ill. Dec. 589, 705 N.E.2d 772 (1998).

(3) Neither state law nor the Federal Constitution mandated that the jury specify in writing which if any mitigating factors it found to exist during the sentencing phase of a capital crime although the defendant argued that such a failure rendered meaningful trial and appellate review of the sentence impossible, violating the right to due process and the right to be free from cruel and unusual punishment.

Kan.—State v. Kleypas, 272 Kan. 894, 40 P.3d 139 (2001).

7 Mo.—State v. Simmons, 955 S.W.2d 729 (Mo. 1997), as modified, (Nov. 25, 1997).

8 Mo.—State v. Simmons, 955 S.W.2d 729 (Mo. 1997), as modified, (Nov. 25, 1997).

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16C C.J.S. Constitutional Law § 1742

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Constitutional Law
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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

1. In General

§ 1742. Death penalty

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4742 to 4746

The imposition of the death penalty upon conviction of certain crimes does not violate due process.

The imposition of the death penalty, upon conviction of certain crimes, generally does not violate due process.[1] Binding precedents of the United States Supreme Court prevent a finding that capital punishment is unconstitutional, under due process principles, based solely on a statistical or theoretical possibility that a defendant might be innocent, and capital punishment cannot constitute a per se violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.[2] Moreover, racial and gender disproportion with respect to the imposition of the death penalty, without more, is not sufficient to violate due process.[3]

The discretion accorded to prosecutors in electing to pursue the death penalty does not, in and of itself, violate due process.[4] Also, a purported lack of statewide standards governing the discretion of local prosecutors to seek or decline the execution of death-eligible defendants does not violate due process.[5] However, to assure that the substantive standards that govern the imposition of the death penalty are fairly, evenhandedly, and properly applied, the basic procedural requirements of the Due

Process Clause of the Fourteenth Amendment of the United States Constitution must be observed,[6] and due process requires a procedure that eliminates the possibility that the death sentence will be applied in an arbitrary and capricious manner.[7]

Due process requires that the defendant in a capital sentencing procedure be informed of the nature and cause of the accusation against him or her and be given notice setting forth the alleged misconduct with particularity, including the aggravating circumstances which the prosecution will seek to prove, sufficiently in advance of the proceedings to afford a reasonable opportunity to prepare a defense.[8] However, where a statute sets forth the aggravating circumstances, due process does not require the State to notify the defendant prior to trial of the aggravating circumstances it intends to prove.[9]

In order to satisfy due process, the statute prescribing the conduct which may result in the imposition of the death penalty, that is, the prohibited aggravating circumstances, must not be overbroad and vague.[10] An aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty.[11]

On the other hand, a death penalty statute does not violate due process by failing to offer guidelines as to what mitigating circumstances may be considered and how they are to be weighed against statutory aggravated circumstances.[12] Moreover, due process is not offended by a statutory requirement that the defendant prove the mitigating circumstances.[13]

A capital murder defendant's constitutional right to due process is satisfied by the requirement that, before considering a sentence of death, jurors unanimously find an aggravating circumstance beyond a reasonable doubt.[14] However, there is authority that due process does not require that a jury in a capital case unanimously find the existence of aggravating factors or that it even make written findings regarding aggravating factors.[15]

The use of the same facts to support the conviction, the finding of special circumstances, and the imposition of the death penalty does not violate due process.[16] However, due process will mandate reversal of a death sentence if the presence of an invalid sentencing factor allowed the sentencer to consider evidence that would not otherwise have been before it.[17]

Proceeding to determine competency to be executed.

A proceeding on an inmate's competency to be executed is sui generis; it is not a trial.[18] Fifth Amendment protections do not apply to such a proceeding except to extent that the prohibition against execution of insane prisoners requires such a proceeding to comport with procedural due process rights to notice and an opportunity to be heard.[19] Where a prisoner is given an opportunity to review, challenge, and rebut all information considered by the trial court in a proceeding to determine the competency of the individual to be executed, there is no violation of any due process right to have the proceeding conducted in an adversarial manner.[20]

Method of execution.

The adoption and implementation of a lethal injection protocol do not implicate a capital defendant's right to substantive due process where the Department of Correction follows a legislative mandate in implementing lethal injection as method of punishment, and has studied the lethal injection protocols of other states and the federal government and used those protocols as models, and where the protocol itself does not create an unreasonable risk of unnecessary pain and suffering.[21]

CUMULATIVE SUPPLEMENT

Cases:

A jury must find the aggravating circumstance that makes the defendant death eligible. McKinney v. Arizona, 140 S. Ct. 702 (2020).

The Constitution allows capital punishment, because death was the standard penalty for all serious crimes at the time of the founding, the later addition of the Eighth Amendment did not outlaw the practice, and the Fifth Amendment, added to the Constitution at the same time as the Eighth Amendment, expressly contemplates that a defendant may be tried for a capital crime and deprived of life as a penalty, so long as proper procedures are followed. U.S. Const. Amends. 5, 8. Bucklew v. Precythe, 139 S. Ct. 1112 (2019).

The same Constitution that permits States to authorize capital punishment also allows them to outlaw it, and that means that the judiciary bears no license to end a debate reserved for the people and their representatives. U.S. Const. Amends. 5, 8. Bucklew v. Precythe, 139 S. Ct. 1112 (2019).

A finding that an inmate is incompetent to be executed does not foreclose the possibility that she may become competent in the future and would no longer be constitutionally ineligible for the death penalty. U.S. Const. Amend. 8. Busby v. Davis, 925 F.3d 699 (5th Cir. 2019).

Under *Ring,*the jury, not a judge, must find the existence of an aggravating factor to make a capital defendant death-eligible. U.S. Const. Amend. 6. Ex parte Bohannon, 222 So. 3d 525 (Ala. 2016), cert. denied, 137 S. Ct. 831, 197 L. Ed. 2d 72 (2017).

Execution of defendant who was mentally ill at the time of his offense does not violate due process clause or Eighth Amendment's prohibition against cruel and unusual punishment; no legislative action or jury behavior reflecting national consensus against the imposition of death penalty against class of persons with mental illness existed, and materials such as position statements of mental health organizations, public opinion poll, and United Nations resolution urging states not to impose death penalty on person living with any form of mental disorder are insufficient to demonstrate emerging standards against imposition of death penalty against defendants living with mental illness. U.S. Const. Amends. 8, 14. People v. Ghobrial, 5 Cal. 5th 250, 234 Cal. Rptr. 3d 669, 420 P.3d 179 (Cal. 2018).

The disparate treatment of minors and those with certain intellectual disabilities, in sparing them the death penalty, did not violate the equal protection and due process rights of a defendant sentenced to death for crimes he committed while suffering from major depression with psychotic features. U.S.C.A. Const.Amend. 14; West's Ann.Cal. Const. Art. 1, § 7; West's Ann.Cal.Penal Code §§ 187, 190.2. People v. Mendoza, 62 Cal. 4th 856, 198 Cal. Rptr. 3d 445, 365 P.3d 297 (2016).

Death-sentenced defendant could not pro se waive pending evidentiary hearing to determine whether he suffered intellectual disability, after evidence created reasonable doubt as to that issue, given that waiver would result in execution someone who might be intellectually disabled individual, in violation of Eighth Amendment. U.S. Const. Amend. 8. White v. Commonwealth, 600 S.W.3d 176 (Ky. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Fla.—Ferguson v. State, 417 So. 2d 631 (Fla. 1982).
Mo.—State v. Bolder, 635 S.W.2d 673 (Mo. 1982).
Neb.—State v. Mata, 275 Neb. 1, 745 N.W.2d 229 (2008).
Ohio—State v. Mammone, 139 Ohio St. 3d 467, 2014-Ohio-1942, 13 N.E.3d 1051 (2014).

Va.—Stamper v. Com., 220 Va. 260, 257 S.E.2d 808 (1979).

As to the ban on cruel and unusual punishment in connection with the death penalty, generally, see § 1741.

2 U.S.—U.S. v. Quinones, 313 F.3d 49 (2d Cir. 2002).

No violation of due process shown

Pennsylvania did not violate the Due Process Clause of the Fourteenth Amendment when it sought the death penalty at a defendant's retrial for murder, after the defendant successfully appealed his conviction and subsequent life sentence, which was imposed following the first capital-sentencing proceeding because the jury deadlocked; nothing indicated that a "life" or "liberty" interest that Pennsylvania law might have given the defendant in a life sentence was somehow immutable, and the defendant was only "deprived" of any such interest by operation of the process he invoked to invalidate his original murder conviction.

U.S.—Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003).

3 Miss.—Batiste v. State, 121 So. 3d 808 (Miss. 2013), cert. denied, 134 S. Ct. 2287, 189 L. Ed. 2d 178 (2014).

4 Ariz.—State v. Ovante, 231 Ariz. 180, 291 P.3d 974 (2013), cert. denied, 134 S. Ct. 86, 187 L. Ed. 2d 66 (2013).

Cal.—People v. Dykes, 46 Cal. 4th 731, 95 Cal. Rptr. 3d 78, 209 P.3d 1 (2009).

5 Miss.—Galloway v. State, 122 So. 3d 614 (Miss. 2013), cert. denied, 134 S. Ct. 2661, 189 L. Ed. 2d 209 (2014).

6 Ind.—Bond v. State, 273 Ind. 233, 403 N.E.2d 812 (1980).

As to the requisites and sufficiency of sentencing procedures under the Due Process Clause, generally, see § 1744.

Substantive due process claim raised

A due process challenge to the Federal Death Penalty Act (FDPA), in which the defendants argued that the constitutional error was in the act of execution itself, not the procedures set forth in the FDPA, was properly framed as one raising a substantive due process claim.

U.S.—U.S. v. Quinones, 313 F.3d 49 (2d Cir. 2002).

7 La.—State v. Martin, 376 So. 2d 300 (La. 1979).

8 La.—State v. Sonnier, 379 So. 2d 1336 (La. 1979).

Failure to give adequate notice

Due process was violated by the sentencing procedure used in an Idaho murder case, where the defendant and his counsel did not have adequate notice that the judge might sentence him to death, where nothing in the record after the State's response to the presentencing order, which formally advised that the State would not recommend the death penalty, and before the judge's remarks at the end of the sentencing hearing indicated that the judge contemplated death as a possible sentence or alerted the parties that the real issue at the hearing was the choice between life and death, and where it therefore was reasonable for the defense to assume that there was no reason to present an argument or evidence directed at the death penalty.

U.S.—Lankford v. Idaho, 500 U.S. 110, 111 S. Ct. 1723, 114 L. Ed. 2d 173 (1991).

9 Fla.—Sireci v. State, 399 So. 2d 964 (Fla. 1981).

Idaho—State v. Osborn, 102 Idaho 405, 631 P.2d 187 (1981).

10 Ga.—Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980).

N.C.—State v. Rook, 304 N.C. 201, 283 S.E.2d 732 (1981).

Continuing threat aggravator not vague or overbroad

Okla.—Myers v. State, 2006 OK CR 12, 133 P.3d 312 (Okla. Crim. App. 2006).

Utter disregard for human life

A capital murder statute, allowing for imposition of the death penalty on the basis of the aggravating circumstance that the defendant exhibited an "utter disregard for human life," meets constitutional requirements as applied to a "cold-blooded, pitiless slayer."

U.S.—Arave v. Creech, 507 U.S. 463, 113 S. Ct. 1534, 123 L. Ed. 2d 188 (1993).

Depravity of mind

A statute allowing depravity of mind to be considered in assessing punishment in capital murder cases is not facially unconstitutional or invalid under the due process clause in that the phrase "depravity of mind" is not vague.

Mo.—State v. Newlon, 627 S.W.2d 606 (Mo. 1982) (overruled on other grounds by, State v. Carson, 941 S.W.2d 518 (Mo. 1997)).

11 U.S.—Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

Cal.—People v. Bunyard, 45 Cal. 4th 836, 89 Cal. Rptr. 3d 264, 200 P.3d 879 (2009).

12 Ariz.—State v. Jordan, 126 Ariz. 283, 614 P.2d 825 (1980).

13 Ariz.—State v. Greenawalt, 128 Ariz. 150, 624 P.2d 828 (1981).

Statute unconstitutional

A statute requiring the imposition of the death penalty if aggravating and mitigating factors weigh equally violates due process.

Colo.—People v. Young, 814 P.2d 834 (Colo. 1991).

14 Okla.—Browning v. State, 2006 OK CR 8, 134 P.3d 816 (Okla. Crim. App. 2006).

15 Cal.—People v. Lewis, 43 Cal. 4th 415, 75 Cal. Rptr. 3d 588, 181 P.3d 947 (2008).

16 Cal.—People v. Marshall, 50 Cal. 3d 907, 269 Cal. Rptr. 269, 790 P.2d 676 (1990).

17 U.S.—Brown v. Sanders, 546 U.S. 212, 126 S. Ct. 884, 163 L. Ed. 2d 723 (2006).

18 Tenn.—State v. Irick, 320 S.W.3d 284 (Tenn. 2010).

19 Tenn.—Coe v. State, 17 S.W.3d 193 (Tenn. 2000) (abrogated on other grounds by, State v. Irick, 320 S.W.3d 284 (Tenn. 2010)).

Failure to request hearing concerning effect of involuntary medication

A condemned prisoner's failure to request a hearing to determine his competency to be executed while he was off antipsychotic medication precluded a determination that he was incompetent to be executed while being involuntarily medicated, and thus, the collateral effect of the involuntary medication rendering him competent to understand the nature and reason for his execution did not violate due process.

Ark.—Singleton v. Norris, 338 Ark. 135, 992 S.W.2d 768 (1999).

20 Tenn.—Coe v. State, 17 S.W.3d 193 (Tenn. 2000) (abrogated on other grounds by, State v. Irick, 320 S.W.3d 284 (Tenn. 2010)).

Procedures constitutionally deficient

Florida's procedures for determining the sanity of a death row prisoner were not "adequate to afford a full and fair hearing" on the critical issue, and therefore, the habeas petitioner was entitled to an evidentiary hearing in the district court, de novo, on the question of his competence to be executed; the Florida scheme was deficient in that it precluded a prisoner or his or her counsel from presenting material relevant to the prisoner's sanity, denied the opportunity to challenge or impeach a state-appointed psychiatrist's opinions, and placed the decision wholly within the executive branch.

U.S.—Ford v. Wainwright, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986).

Adversarial hearing required

Due process requires that a defendant who challenges his or her competency to be executed and who meets his or her initial burden be given reasonable notice if an evidentiary hearing is to be held that the defendant be present at the hearing and represented by counsel, that the hearing be adversarial in nature, and that the defendant be allowed to present all material, relevant evidence necessary to overcome the strong presumption of sanity.

Wash.—State v. Harris, 114 Wash. 2d 419, 789 P.2d 60 (1990).

21 Tenn.—Abdur'Rahman v. Bredesen, 181 S.W.3d 292 (Tenn. 2005).

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16C C.J.S. Constitutional Law § 1743

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Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

1. In General

§ 1743. Enhanced or extended sentence

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4702, 4709

Due process generally is not violated by the imposition upon a defendant of an enhanced or extended sentence, pursuant to enhancement of punishment statutes.

Due process generally is not violated by the imposition upon a defendant of an enhanced or extended sentence pursuant to enhancement of punishment statutes,[1] such as those concerning dangerous offenders[2] or habitual criminals.[3] However, although habitual offender and other types of recidivist statutes may be constitutional, the State must provide a defendant with a number of due process rights before imposing a recidivist enhanced criminal penalty or sentence.[4] Except for sentence enhancement provisions that are based on a defendant's prior conviction, the Due Process Clause and the Sixth Amendment require a jury to find, beyond a reasonable doubt, the existence of every element of a sentence enhancement that increases the penalty for a crime beyond the prescribed statutory maximum punishment for that crime.[5]

Ordinarily, an habitual criminal statute requires a valid prior conviction to be entered for its enhanced penalty requirements to apply.[6]

Effect of prosecutorial discretion.

An habitual criminal or offender statute does not violate due process by allowing a prosecutor to exercise discretion in determining whether or not to bring an habitual offender charge in a given case, absent unjustifiable or arbitrary discrimination.[7] Laxity in the enforcement of an habitual criminal statute, even though without apparent excuse, is insufficient to render the application of the statute to an individual defendant a denial of due process of law, in the absence of any showing of arbitrary or capricious action or a willful intention to discriminate.[8] Furthermore, due process is not violated even where an habitual criminal statute fails to provide guidelines for its application.[9] On the other hand, a dangerous special offender statute which establishes an unduly vague and uncertain standard may be violative of due process.[10]

Footnotes

1 U.S.—Cook v. Smith, 427 F.2d 1172 (5th Cir. 1970); Goodrum v. Beto, 296 F. Supp. 710 (S.D. Tex. 1969).
As to due process considerations with respect to the procedure for imposing enhanced or extended sentences, generally, see § 1751.
Enhancement after expectations as to finality have crystallized
A defendant's due process rights may be violated when a sentence is enhanced after the defendant has served so much of his or her sentence that the defendant's expectations as to finality have crystallized, and it would be fundamentally unfair to defeat them.
U.S.—U.S. v. Davis, 329 F.3d 1250 (11th Cir. 2003).

2 Ill.—People v. DeSimone, 108 Ill. App. 3d 1015, 64 Ill. Dec. 503, 439 N.E.2d 1311 (2d Dist. 1982).
Minn.—State v. Michaud, 276 N.W.2d 73 (Minn. 1979).
Due process not violated by statutory classification of offenses
Statutory classification of manslaughter as a "violent felony," and the exclusion of aggravated vehicular homicide from that classification, under a sentencing scheme whereby violent felony convictions could be used as a basis for a habitual criminal enhanced penalty, did not violate the due process rights of a defendant sentenced as an habitual offender after a conviction for manslaughter for the beating death of his wife.
Wyo.—Bell v. State, 693 P.2d 769 (Wyo. 1985).

3 U.S.—Frazier v. Harrison, 537 F. Supp. 13 (E.D. Tenn. 1981), aff'd, 698 F.2d 1219 (6th Cir. 1982).
Fla.—Heath v. State, 648 So. 2d 660 (Fla. 1994).
Calculation of an offender's criminal history score
Kan.—State v. Fischer, 288 Kan. 470, 203 P.3d 1269 (2009).
Time of prior offenses
(1) Application of an habitual criminal statute to a defendant whose two prior offenses were committed on the same day, prosecuted in the same information, and resulted in concurrent sentences, did not violate due process.
U.S.—Pierce v. Parratt, 666 F.2d 1205 (8th Cir. 1981).
(2) The remoteness, in time, of a prior offense does not render a sentence suspect.
Kan.—State v. Foy, 224 Kan. 558, 582 P.2d 281 (1978).

4 Fla.—Mayes v. Moore, 827 So. 2d 967 (Fla. 2002).

5 Cal.—People v. Sengpadychith, 26 Cal. 4th 316, 26 Cal. 4th 1154a, 109 Cal. Rptr. 2d 851, 27 P.3d 739 (2001), as modified, (Oct. 17, 2001).
Proof of unadjudicated criminal conduct
There is no due process requirement that the prosecution prove beyond a reasonable doubt that the defendant engaged in unadjudicated criminal conduct that is offered as evidence in the sentencing phase of a capital murder trial.
Va.—Walker v. Com., 258 Va. 54, 515 S.E.2d 565 (1999).

6 U.S.—Fairris v. Beto, 446 F.2d 1290 (5th Cir. 1971).
Uncounseled misdemeanor convictions

Consistent with due process, uncounseled misdemeanor convictions which are valid due to the absence of the imposition of a prison term, are valid when used to enhance punishment at a subsequent conviction.

U.S.—Nichols v. U.S., 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994).

Consideration of uncharged prior bad acts

A section of a sexual abuse statute providing for an enhanced penalty if a defendant committed five other acts of sexual abuse did not violate due process by allowing the trier of fact to consider uncharged prior bad acts in the guilt phase of a criminal proceeding.

Utah—State v. Bishop, 753 P.2d 439 (Utah 1988).

Invalid guilty pleas

Use in an habitual criminal proceeding of guilty pleas not shown to have been validly obtained effectively renews the constitutional violation inherent in initial uninformed pleas of guilty, resulting in a denial of due process.

Wash.—State v. Gear, 30 Wash. App. 307, 633 P.2d 930 (Div. 2 1981).

7 Ind.—Eaton v. State, 274 Ind. 73, 408 N.E.2d 1281 (1980).

Neb.—State v. White, 209 Neb. 218, 306 N.W.2d 906 (1981).

Nev.—Hollander v. Warden, Nev. State Prison, 86 Nev. 369, 468 P.2d 990 (1970).

Due process not denied

Where a prosecutor's written standards for filing written habitual criminal charges created two major classes of felonies, one for "high impact" crimes and the other for "expedited" crimes, and where, under standards, an individual who committed a "high impact" crime and who had two prior felonies was not automatically proceeded against as a habitual criminal and the standards allowed for exceptions in any case, the standards did not deny a defendant due process.

Wash.—State v. Rowe, 93 Wash. 2d 277, 609 P.2d 1348 (1980).

Duty to show convictions

Whenever a district attorney has knowledge of a defendant's prior convictions, the district attorney must, as an officer of the court, "show" those convictions to the court so that the court can sentence the accused in accordance with the clear mandate of the recidivist statute; therefore, the prosecution has no discretion about whether or not to "show" prior convictions, refuting a contention that the statute violates due process by vesting sole discretion as to whether the statute is invoked with the district attorney's office.

Ala.—Waites v. State, 409 So. 2d 1005 (Ala. Crim. App. 1982).

8 Ark.—Poe v. State, 251 Ark. 35, 470 S.W.2d 818 (1971).

9 Kan.—Churchill v. State, 216 Kan. 399, 532 P.2d 1070 (1975).

Unbridled discretion

(1) The Due Process Clause is not violated because a statute governing dangerous special offender sentencing gives the prosecutor "unbridled discretion" whether to proceed against any particular defendant to whom the statute might apply.

U.S.—U.S. v. Inendino, 463 F. Supp. 252 (N.D. Ill. 1978).

(2) A dangerous special offender act did not grant the prosecutor such unbridled discretion as to contravene due process.

N.D.—State v. Ternes, 259 N.W.2d 296 (N.D. 1977).

No deprivation of due process shown

Even though a defendant was the only person charged as a habitual criminal during a county prosecuting attorney's term in office of nearly four years, where the prosecutor determined that the defendant was gravitating from nonviolent to violent crime, that his prior incarcerations had not resulted in rehabilitation, that he had plotted further criminal activities while in prison, and that he presented a danger to society, application to the defendant of the habitual criminal statute was not arbitrary and discriminatory and did not deprive the defendant of due process.

Wash.—State v. Thomas, 16 Wash. App. 1, 553 P.2d 1357 (Div. 2 1976).

10 U.S.—U.S. v. Duardi, 384 F. Supp. 874 (W.D. Mo. 1974), judgment aff'd, 529 F.2d 123 (8th Cir. 1975).

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16C C.J.S. Constitutional Law § 1744

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Constitutional Law
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§ 1744. General due process requirements regarding requisites and sufficiency of sentencing procedure

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4700 to 4702

The sentencing process must satisfy the requirements imposed by the constitutional guarantee of due process.

In general, each stage of the postconviction process must be examined independently in determining a defendant's due process rights,[1] and the sentencing process must satisfy the requirements of due process.[2] Nonetheless, due process may apply in sentencing without implicating the entire panoply of criminal trial procedural rights.[3] Moreover, due process does not require strict proportionality between a crime and its punishment.[4]

An accused generally must be present in court when a sentence is pronounced on him or her in order to comport with the requirement of due process of law.[5] Moreover, due process requires that the defendant be afforded the right to allocution at the sentencing stage of a trial[6] and the right to be represented by counsel.[7]

There is authority that due process does not require a court to give an explanation or reasons for its sentence.[8] However, it has also been held that, as a matter of procedural due process, a sentencing judge must explain a sentence sufficiently to communicate that a reasoned decision has been made and permit meaningful appellate review.[9] Moreover, a sentencing court's arbitrary refusal to consider the entire range of punishment would constitute a denial of due process.[10]

Redetermination of release date; recomputation of sentence.

An administrative redetermination by a prison board of a prisoner's release date after his or her prison term has begun does not constitute a violation of due process,[11] but because of the loss of liberty that results from the redetermination of a sentence, due process applies to the procedure.[12] Therefore, an inmate, although not entitled to the full panoply of constitutional rights accorded citizens in general, is entitled to some form of a due process hearing prior to an administrative recomputation of his or her sentence.[13] On the other hand, due process does not require a hearing when a sentence is merely extended to reflect the period of time that a prisoner is absent from custody after he or she has escaped.[14]

CUMULATIVE SUPPLEMENT

Cases:

To not be void for vagueness under Fifth Amendment due process, statutes fixing sentences must specify the range of available sentences with sufficient clarity. U.S.C.A. Const.Amend. 5. Beckles v. U.S., 137 S. Ct. 886 (2017).

After conviction, a defendant's due process right to liberty, while diminished, is still present, as he retains an interest in a sentencing proceeding that is fundamentally fair. U.S.C.A. Const.Amends. 5, 14. Betterman v. Montana, 136 S. Ct. 1609 (2016).

Defendant was not denied due process in sentencing for possession of methamphetamine with intent to distribute; defendant filed objections to the original presentence report, and cross-examined girlfriend at the hearing, but declined the opportunity to call his own witnesses. U.S. Const. Amend. 5; Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(a)(1). United States v. Miller, 834 F.3d 737 (7th Cir. 2016).

Statute providing that rules of evidence did not apply to sentencing for capital murder did not violate Due Process Clause of New Hampshire Constitution based on defendant's claim that it resulted in introduction of unreliable evidence; admission of more, rather than less evidence during penalty phase increased reliability by providing full and complete information about defendant and allowed for individualized inquiry into appropriate sentence for offense, statute specifically provided for exclusion of evidence for which its probative value was substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading jury, which retained trial court's traditional role as gatekeeper of evidence, and it served State's significant interest in ensuring that sentencer had full and complete information about defendant. N.H. Const. pt. I, art. 15; N.H. Rev. Stat. Ann. § 630:5, III State v. Addison, 165 N.H. 381, 87 A.3d 1 (2013).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—U.S. v. Fatico, 458 F. Supp. 388, 3 Fed. R. Evid. Serv. 391 (E.D. N.Y. 1978), judgment aff'd, 603 F.2d 1053 (2d Cir. 1979).

2 U.S.—Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977); Carter v. Mitchell, 693 F.3d 555 (6th Cir. 2012).
Kan.—State v. Easterling, 289 Kan. 470, 213 P.3d 418 (2009).
Miss.—Beamon v. State, 9 So. 3d 376 (Miss. 2009).
Pa.—Com. v. Walker, 286 Pa. Super. 239, 428 A.2d 661 (1981).

Critical stage of criminal prosecution

Ill.—People v. Ackerman, 132 Ill. App. 2d 251, 269 N.E.2d 737 (2d Dist. 1971).
La.—State v. Davalie, 313 So. 2d 587 (La. 1975).

Random and unpredictable sentencing anathema to due process

N.J.—State v. Palma, 219 N.J. 584, 99 A.3d 806 (2014).

Due process rights

A defendant has the due process right to be present at sentencing and to be afforded right of allocution, the right to be represented by counsel, and the right to be sentenced on the basis of true and correct information.
Wis.—State v. Perez, 170 Wis. 2d 130, 487 N.W.2d 630 (Ct. App. 1992).

3 U.S.—Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).
Haw.—State v. Ortez, 60 Haw. 107, 588 P.2d 898 (1978).
Neb.—State v. Galindo, 278 Neb. 599, 774 N.W.2d 190 (2009).
Pa.—Com. v. Opara, 240 Pa. Super. 511, 362 A.2d 305 (1976).

4 Wash.—State v. Jordan, 180 Wash. 2d 456, 325 P.3d 181 (2014).

5 Idaho—State v. Ditmars, 98 Idaho 472, 567 P.2d 17 (1977).
Or.—Stacey v. State, 30 Or. App. 1075, 569 P.2d 640 (1977).
Wis.—Bruneau v. State, 77 Wis. 2d 166, 252 N.W.2d 347 (1977).

Exercise of judicial discretion

A defendant has a due process right to be present at any sentencing or resentencing hearing at which judicial discretion will be exercised.
Fla.—Stang v. State, 24 So. 3d 566 (Fla. 2d DCA 2009).

Appearance by defendant with counsel after entry of order of execution

Appearance by a defendant with court-appointed counsel after entry of an order of execution was adequate to meet any due process rights the defendant may have had to be present when a state trial judge set a date for execution.
U.S.—Belyeu v. Johnson, 82 F.3d 613 (5th Cir. 1996).

Effect of voluntary absence

Due process is not violated by the imposition of sentence in the absence of a defendant who has voluntarily absented himself or herself from the proceedings, thus waiving the right to be present.
U.S.—Byrd v. Hopper, 537 F.2d 1303 (5th Cir. 1976).

6 D.C.—Bradley v. District of Columbia, 107 A.3d 586 (D.C. 2015).
Utah—State v. Rodrigues, 2009 UT 62, 218 P.3d 610 (Utah 2009).
Wis.—Bruneau v. State, 77 Wis. 2d 166, 252 N.W.2d 347 (1977).

Right not unlimited

A defendant's right to address the sentencing court is not unlimited; the exercise of that right may be limited both as to duration and as to content, and a defendant need be given no more than a reasonable period of time.
U.S.—Ashe v. State of N.C., 586 F.2d 334 (4th Cir. 1978).

7 Fla.—Carter v. State, 408 So. 2d 766 (Fla. 5th DCA 1982).
Wis.—Bruneau v. State, 77 Wis. 2d 166, 252 N.W.2d 347 (1977).
As to due process considerations with respect to the death penalty, generally, see § 1742.

Right to effective assistance of counsel violated

A defendant's constitutional rights to due process and effective assistance of court-appointed counsel at the sentencing stage were violated where counsel failed to present any evidence of mitigating circumstances on the capital penalty issue, even though an array of witnesses to testify in mitigation would have been readily available on proper investigation, and where the entire defense of sentencing consisted of "argument" that it was up to the jury to apply the aggravating and mitigating circumstances and determine whether imposition of the death penalty would benefit society and serve the ends of justice.
U.S.—Voyles v. Watkins, 489 F. Supp. 901 (N.D. Miss. 1980).

8 Iowa—State v. Welsh, 245 N.W.2d 290 (Iowa 1976).

N.Y.—People ex rel. Dubinsky v. Conboy, 40 A.D.2d 908, 337 N.Y.S.2d 876 (3d Dep't 1972).
Or.—Sullivan v. Cupp, 54 Or. App. 162, 634 P.2d 288 (1981).

9 U.S.—U.S. v. Collins, 684 F.3d 873 (9th Cir. 2012).

10 Tex.—Ex parte Brown, 158 S.W.3d 449 (Tex. Crim. App. 2005).
As to information considered in sentencing, see §§ 1745 to 1747.

11 U.S.—Guzman v. Morris, 644 F.2d 1295 (9th Cir. 1981).

12 U.S.—Anderson v. Nelson, 352 F. Supp. 1124 (N.D. Cal. 1972).

13 U.S.—Anderson v. Nelson, 352 F. Supp. 1124 (N.D. Cal. 1972).
Pa.—Carter v. Com., Dept. of Justice, and Bureau of Corrections, 43 Pa. Commw. 416, 402 A.2d 711 (1979).

14 U.S.—U.S. v. Luck, 664 F.2d 311 (D.C. Cir. 1981).
Ind.—Hendrixson v. Lash, 258 Ind. 550, 282 N.E.2d 792 (1972).

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16C C.J.S. Constitutional Law § 1745

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Constitutional Law
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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

2. Requisites and Sufficiency of Sentencing Procedure

§ 1745. Information considered

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4705 to 4708

Due process generally does not require that the information considered by a judge prior to sentencing meet the same high procedural standards as evidence introduced at a trial.

A convicted defendant has a due process right to a fair sentencing process, one in which the court goes through a rational procedure of selecting a sentence based on relevant considerations and accurate information.[1] Thus, a defendant's right to due process is violated if he or she is sentenced based on factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as the race, religion, or political affiliation of the defendant.[2] Moreover, due process is violated when the sentencing judge relies on material false assumptions as to any facts relevant to sentencing.[3] However, due process generally does not require that the information considered by a judge prior to sentencing meet the same high procedural standards as evidence introduced at a trial.[4] Rather, judges may consider a wide variety of information,[5] including responsible unsworn or out-of-court information relative to the circumstances of the crime and to the convicted person's life and circumstances.[6] A trial judge must be informed of many things which do not always develop at a trial, and the judge may take advantage of all possible sources of information.[7] Due process is not violated by the use of hearsay evidence in determining a sentence[8]

so long as the defendant is afforded an opportunity to refute it and so long as the evidence is reliable.[9] Moreover, a criminal defendant's due process rights are violated when hearsay testimony at the penalty phase of a capital trial is excluded, if the excluded testimony is highly relevant to a critical issue in the punishment phase of the trial, and there are substantial reasons to assume the reliability of the evidence.[10]

A sentencing judge is not restricted to the evidence derived from the examination and cross-examination of witnesses in open court but may, consistently with due process, consider responsible unsworn or out-of-court information relative to the circumstances of the crime and to the convicted person's life and characteristics.[11]

Victim impact evidence may be introduced at the sentencing phase of a criminal case without necessarily rendering the trial fundamentally unfair in violation of due process.[12] However, in the event that victim impact evidence introduced at the sentencing phase is unduly prejudicial, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.[13]

Information material to mitigation of punishment.

Due process requires that a sentencing judge listen to and fairly consider information material to mitigation of punishment.[14] The Eighth and Fourteenth Amendments of the United States Constitution require that the sentencer not be precluded from considering, as a mitigating factor, any aspect of a capital defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.[15]

Presentence report.

Facts in the presentence report which are uncontested at the sentencing hearing may be relied upon by the court in sentencing and do not require an evidentiary hearing.[16] The sentencing judge is free to rely upon the information contained in the presentence report in imposing sentence where the defendant does not challenge the accuracy of any of the information contained in the report but only the inferences drawn from it.[17] A district court, without further justification or explanation, can adopt the presentence investigation's facts as they stand in the report, where the defendant disputes those facts but provides no rebuttal evidence, provided those facts have an adequate evidentiary basis.[18]

If the court desires additional sentencing information, it can request a supplemental presentence report, insuring that the report will be disclosed pursuant to rule, or permit the taking of testimony in open court, and either of these procedures will satisfy the minimum due process requirements of notice and opportunity to be heard.[19]

CUMULATIVE SUPPLEMENT

Cases:

It is not the role of the Eighth Amendment to establish a special federal code of evidence governing the admissibility of evidence at capital sentencing proceedings; rather, it is the Due Process Clause that wards off the introduction of unduly prejudicial evidence that would render the trial fundamentally unfair. U.S.C.A. Const.Amends. 5, 8, 14. Kansas v. Carr, 136 S. Ct. 633 (2016).

District court did not abuse its discretion, in sentencing defendant for corruptly endeavoring to obstruct and impede due administration of Internal Revenue laws and willfully failing to file individual and corporate tax returns, by not obtaining additional information regarding amount of tax loss and restitution amount, even though defendant's proffered tax returns

indicated lesser tax loss and restitution amount, where defendant did not reply to multiple inaccuracies that government identified in those returns. United States v. Marinello, 839 F.3d 209 (2d Cir. 2016).

District court did not violate defendant's Fifth Amendment right to be sentenced based on accurate information when it determined $16 million intended loss in sentencing defendant for mail fraud prosecution based on defendant's participation in scheme to file fraudulent tax returns, despite defendant's contention that intended loss attributed to him far exceeded what defendants in other cases were held responsible for, where defendant provided no evidence contradicting information provided by government, and court ultimately rejected chart of other prosecutions prepared by government and looked at defendant individually. U.S. Const. Amend. 5. United States v. Walton, 907 F.3d 548 (7th Cir. 2018).

Defendant failed to show the material falsity or unreliability, at sentencing, of hearsay evidence of defendant's earlier sexual abuse of his oldest biological daughter, and of two daughters of his friend, contained in case file for case in which defendant had entered no-contest plea to two state-law offenses for sexual conduct with children, or contained in depositions of friend and one of her daughters in earlier case, and thus, defendant's due process rights were not violated by district court's consideration of hearsay evidence, at federal sentencing for receiving child pornography; for example, friend's and her daughter's descriptions of what defendant had done were consistent each time they were interviewed and were consistent with each other's sworn statements, and their hearsay statements were corroborated by evidence found when defendant's house was searched. U.S. Const. Amend. 5; 18 U.S.C.A. § 2252A(a)(2), (b)(1). United States v. Hall, 965 F.3d 1281 (11th Cir. 2020).

District court did not improperly refuse to hear argument from defense counsel before sua sponte imposing two-point obstruction-of-justice enhancement to defendant's sentence for encouraging and inducing aliens to enter United States, but rather, counsel failed to argue the point, and thus, a new sentencing hearing was not warranted; although district court noticed a defense objection to the enhancement without explicitly stating the basis of the objection, it did ask counsel whether there was anything else regarding the enhancements it applied, the court then heard further argument from the parties regarding whether to deviate from the applicable guidelines range, but defense counsel did not attempt to counter the government's argument or push back on court's conclusion that defendant suborned perjury. U.S.S.G. §§ 3C1.1, 6A1.3(a); Fed. R. Crim. P. 32(i). United States v. Plasencia, 886 F.3d 1336 (11th Cir. 2018).

When the trial court, at sentencing, considers whether the defendant was truthful in his testimony or failed to show remorse, fundamental error or denial of due process may result. U.S. Const. Amend. 14. Beauchamp v. State, 273 So. 3d 247 (Fla. 5th DCA 2019).

Trial court did not deny defendant due process at sentencing by denying his request to admit seven photographs allegedly depicting the injuries he sustained at the hands of arresting officers on the night of his arrest, despite argument that photographs related to the court's imposition of anger-management counseling in that they would have shown that defendant was at fault for his anger; the assault-on-a-peace-officer charge had been dismissed, and although the court refused to accept the photographs as evidence, it did allow them to be placed in the file. U.S. Const. Amend. 14, § 1; Mont. Const. art. 2, § 17. State v. LaField, 2017 MT 312, 407 P.3d 682 (Mont. 2017).

[END OF SUPPLEMENT]

Footnotes

1 D.C.—Thorne v. U.S., 46 A.3d 1085 (D.C. 2012).

2 U.S.—Bates v. Secretary, Florida Dept. of Corrections, 768 F.3d 1278 (11th Cir. 2014).

Gender

Criminal defendants have a due process right not to be sentenced on the basis of gender.

Wis.—State v. Harris, 2010 WI 79, 326 Wis. 2d 685, 786 N.W.2d 409 (2010).

3 D.C.—Bradley v. District of Columbia, 107 A.3d 586 (D.C. 2015).

4 U.S.—U.S. v. Robelo, 596 F.2d 868 (9th Cir. 1979); U.S. v. Marshall, 519 F. Supp. 751 (E.D. Wis. 1981), aff'd, 688 F.2d 842 (7th Cir. 1982) and judgment aff'd, 719 F.2d 887 (7th Cir. 1982).

Conn.—State v. Altajir, 303 Conn. 304, 33 A.3d 193 (2012).

As to due process considerations with respect to the death penalty, generally, see § 1742.

Wider than normal discretion

A statute governing the admissibility of evidence during the sentencing phase of a capital case that allowed the trial judge wider discretion than would normally be allowed under the rules of evidence did not violate defendant's right to due process or confrontation; although defendant argued that the capital sentencing scheme violated his rights to due process and confrontation because the rules of evidence did not apply and the jury was permitted to hear evidence that was not reliable and trustworthy, the standards set forth in the statute allowed trial courts to exclude evidence that could violate the constitutional guarantees of due process or confrontation.

Tenn.—State v. Reid, 164 S.W.3d 286 (Tenn. 2005).

5 Conn.—State v. Altajir, 303 Conn. 304, 33 A.3d 193 (2012).

6 Conn.—State v. Ortiz, 83 Conn. App. 142, 848 A.2d 1246 (2004).

7 Cal.—People v. Ratcliffe, 124 Cal. App. 3d 808, 177 Cal. Rptr. 627 (1st Dist. 1981).

D.C.—Williams v. U. S., 427 A.2d 901 (D.C. 1980).

Ill.—People v. La Pointe, 88 Ill. 2d 482, 59 Ill. Dec. 59, 431 N.E.2d 344 (1981).

Consideration of prior arrests which did not result in conviction allowed

U.S.—U.S. v. Morgan, 595 F.2d 1134 (9th Cir. 1979).

La.—State v. Rogers, 405 So. 2d 829 (La. 1981).

Mich.—People v. Beal, 104 Mich. App. 159, 304 N.W.2d 513 (1981).

Effect of acquittal on charges considered in sentencing

Due process did not require resentencing on rape charges after the defendant had been acquitted on other rape charges that were considered when the defendant was sentenced.

Ill.—People v. Jackson, 149 Ill. 2d 540, 174 Ill. Dec. 842, 599 N.E.2d 926 (1992).

Consideration of unadjudicated offenses

Evidence of unadjudicated, extraneous rape offenses admitted at the punishment phase of a prosecution for capital murder did not render the proceedings fundamentally unfair or deprive the defendant of due process, absent a showing of unfair surprise.

Tex.—Williams v. State, 622 S.W.2d 116 (Tex. Crim. App. 1981).

8 U.S.—U.S. v. Ammirato, 670 F.2d 552, 10 Fed. R. Evid. Serv. 95 (5th Cir. 1982).

Minn.—State v. Adams, 295 N.W.2d 527 (Minn. 1980).

S.D.—State v. Ellefson, 287 N.W.2d 493 (S.D. 1980).

9 U.S.—U.S. v. Ammirato, 670 F.2d 552, 10 Fed. R. Evid. Serv. 95 (5th Cir. 1982).

As to due process in connection with a defendant's opportunity to rebut information considered in sentencing, generally, see § 1747.

10 U.S.—Brown v. Luebbers, 371 F.3d 458, 64 Fed. R. Evid. Serv. 437 (8th Cir. 2004).

Cal.—People v. Williams, 40 Cal. 4th 287, 52 Cal. Rptr. 3d 268, 148 P.3d 47 (2006).

11 U.S.—Williams v. State of Okl., 358 U.S. 576, 79 S. Ct. 421, 3 L. Ed. 2d 516 (1959).

S.D.—State v. Ellefson, 287 N.W.2d 493 (S.D. 1980).

Consideration of defendant's juvenile record permitted

Cal.—People v. Berry, 117 Cal. App. 3d 184, 172 Cal. Rptr. 756 (5th Dist. 1981).

Pa.—Com. v. Johnson, 293 Pa. Super. 143, 437 A.2d 1246 (1981).

Reputation testimony

A petitioner was not denied due process of law by the introduction of an assistant attorney general's testimony at the punishment phase of a trial as to the petitioner's reputation in the community, knowledge of which the assistant attorney general had obtained while investigating the petitioner's earlier conviction, which was ultimately overturned due to ineffective assistance of counsel.

U.S.—Sparkman v. Estelle, 672 F.2d 559 (5th Cir. 1982).

12 Cal.—People v. Zamudio, 43 Cal. 4th 327, 75 Cal. Rptr. 3d 289, 181 P.3d 105 (2008), as modified, (June 11, 2008).

13 U.S.—Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991); Allen v. Woodford, 395 F.3d 979 (9th Cir. 2005).
Fla.—Braddy v. State, 111 So. 3d 810 (Fla. 2012), cert. denied, 134 S. Ct. 275, 187 L. Ed. 2d 199 (2013).

14 U.S.—U.S. v. Coletta, 682 F.2d 820 (9th Cir. 1982).

15 U.S.—Fullwood v. Lee, 290 F.3d 663, 59 Fed. R. Evid. Serv. 115 (4th Cir. 2002).
Ariz.—State v. Carreon, 210 Ariz. 54, 107 P.3d 900 (2005), opinion supplemented, 211 Ariz. 32, 116 P.3d 1192 (2005).

16 U.S.—U.S. v. O'Dell, 965 F.2d 937 (10th Cir. 1992).

17 U.S.—U.S. v. Rigby, 896 F.2d 392 (9th Cir. 1990).
As to the necessity of accuracy and reliability of information relied upon in sentencing, see § 1746.

18 U.S.—U.S. v. Rodriguez, 897 F.2d 1324 (5th Cir. 1990).

19 Wash.—State v. Giebler, 22 Wash. App. 640, 591 P.2d 465 (Div. 1 1979) (disapproved of on other grounds by, State v. Sanchez, 146 Wash. 2d 339, 46 P.3d 774 (2002)).
Right to due process not violated
(1) At the penalty phase of a capital murder case, the defendant's right to due process was not violated by the trial court's considering a presentence report that contained confidential mental health records obtained from the Department of Correctional Services (DCS) where the trial court provided the defendant with notice and an ample opportunity to obtain access to the DCS records.
Neb.—State v. Dunster, 262 Neb. 329, 631 N.W.2d 879 (2001).
(2) The trial judge's ordering a defendant to undergo a comprehensive sex offender presentence evaluation, with the results of three tests on the defendant included in a presentence report sent to the judge prior to final sentencing, did not violate the defendant's right to due process and a fair sentencing where the tests had nothing to do with sentencing and had no effect on sentencing procedures.
Ky.—Douglas v. Com., 83 S.W.3d 462 (Ky. 2001), as modified on denial of reh'g, (Sept. 26, 2002).

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

2. Requisites and Sufficiency of Sentencing Procedure

§ 1746. Information considered—Accuracy and reliability

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4705 to 4708

In the context of sentencing, due process requires the balancing of the need for reliability with the need to permit the consideration of all pertinent information, but a due process right exists to be sentenced only on information which is accurate and reliable.

In the context of sentencing, due process requires the balancing of the need for reliability with the need to permit the consideration of all pertinent information,[1] and so long as the information which a judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence.[2] Nevertheless, a due process right exists to be sentenced only on information which is accurate and reliable,[3] and sentences based upon information or assumptions that are materially false or unreliable violate due process[4] whether the error is caused by carelessness or by design.[5]

In order to prevail on a claim that a sentence violates due process because it is based on materially inaccurate information, a defendant must establish that the challenged information is false or unreliable,[6] together with the fact that the sentencing judge relied on that information.[7] Where such matters are established, due process requires that the defendant be resentenced.[8]

Reliance on hearsay.

The nature of a presentence report necessitates relying upon hearsay information to a great extent.[9] The inclusion of hearsay evidence, such as letters of parents of victims of uncharged crimes, in a presentence report does not violate a defendant's due process rights, where the statements are sufficiently reliable for the court to consider them in imposing sentence, in the absence of evidence that manifest injustice would result from the inclusion of the statements.[10]

CUMULATIVE SUPPLEMENT

Cases:

Defendant failed to establish that allegedly false information indicating that he was eligible for sentencing enhancement under Armed Career Criminal Act (ACCA) was demonstrably made basis for his sentence for being felon in possession of firearm, in violation of his due process rights, even though his indictment included ACCA charge, where charge was dismissed when he entered his change of plea, presentence report noted that ACCA charge had been stricken, plea agreement stated that "non-Armed Career Criminal sentence is appropriate," and sentencing court did not reference ACCA when it imposed below-Guidelines sentence. U.S. Const. Amend. 5; 18 U.S.C.A. § 924(e)(1). United States v. Hill, 915 F.3d 669 (9th Cir. 2019).

State failed to show that trial court did not impermissibly rely upon defendant's post-arrest misconduct in sentencing him to seven years in prison for first-degree arson of dwelling, and thus violated defendant's due process rights, although trial court made no comment indicating that it had considered defendant's subsequent misconduct in imposing sentence, and although trial court did not impose vindictive sentence; State urged trial court to consider impermissible sentencing factor, prosecutor's recommendation at sentencing hearing relied heavily upon evidence of defendant's post-arrest misconduct, and trial court imposed exact sentence requested by prosecutor. U.S. Const. Amend. 14. Garcia v. State, 279 So. 3d 148 (Fla. 4th DCA 2019).

Defendant has constitutional due process right to be sentenced upon accurate information. U.S. Const. Amends. 5, 14; Wis. Const. art. 1, § 8. State v. Coffee, 2020 WI 1, 937 N.W.2d 579 (Wis. 2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Orner v. U.S., 578 F.2d 1276 (8th Cir. 1978).

2 U.S.—U.S. v. Bradley, 628 F.3d 394 (7th Cir. 2010).
Polygraph examination
A polygraph examination is not sufficiently accurate to allow it to be imposed upon a defendant in order to determine whether he or she is guilty of other criminal conduct prior to sentencing, and imposition of a polygraph examination in such circumstances is a violation of due process.
Mich.—People v. Dockery, 65 Mich. App. 600, 237 N.W.2d 575 (1975).

3 U.S.—U.S. v. Ghertler, 605 F.3d 1256 (11th Cir. 2010).
N.Y.—People v. Wright, 104 Misc. 2d 911, 429 N.Y.S.2d 993 (Sup 1980).
Or.—Stacey v. State, 30 Or. App. 1075, 569 P.2d 640 (1977).

Wis.—Bruneau v. State, 77 Wis. 2d 166, 252 N.W.2d 347 (1977).

As opposed to speculation or unfounded allegations

U.S.—Warren v. Baenen, 712 F.3d 1090 (7th Cir. 2013).

Hearsay

A defendant may not be sentenced on the basis of misinformation of constitutional magnitude; accordingly, due process requires that some minimal indicia of reliability accompany a hearsay statement offered at sentencing.

S.D.—State v. Berget, 2013 SD 1, 826 N.W.2d 1 (S.D. 2013).

4 U.S.—Roberts v. U. S., 445 U.S. 552, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980); U.S. v. Warren, 720 F.3d 321 (5th Cir. 2013).

Federal and state constitutional protection

Mont.—State v. Morris, 2010 MT 259, 358 Mont. 307, 245 P.3d 512 (2010).

5 Wis.—State v. Travis, 2013 WI 38, 347 Wis. 2d 142, 832 N.W.2d 491 (2013).

6 U.S.—U.S. v. Rivera, 682 F.3d 1223 (9th Cir. 2012).

7 U.S—U.S. v. Cimino, 659 F.2d 535 (5th Cir. 1981); U.S. v. Ching, 682 F.2d 799 (9th Cir. 1982).

Cal.—People v. Santana, 134 Cal. App. 3d 773, 184 Cal. Rptr. 733 (2d Dist. 1982).

Information demonstrably made basis for sentence

U.S.—U.S. v. Rivera, 682 F.3d 1223 (9th Cir. 2012).

8 U.S.—Moore v. U.S., 571 F.2d 179 (3d Cir. 1978).

Mass.—Com. v. LeBlanc, 370 Mass. 217, 346 N.E.2d 874 (1976).

Mich.—People v. Lauzon, 84 Mich. App. 201, 269 N.W.2d 524 (1978).

Entire procedure invalid

Misinformation or a misunderstanding that is materially untrue regarding prior a criminal record, or material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process.

U.S.—U.S. v. Fatico, 458 F. Supp. 388, 3 Fed. R. Evid. Serv. 391 (E.D. N.Y. 1978), judgment aff'd, 603 F.2d 1053 (2d Cir. 1979).

9 Neb.—State v. Jordan, 229 Neb. 563, 427 N.W.2d 796 (1988).

10 Wyo.—Mehring v. State, 860 P.2d 1101 (Wyo. 1993).

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

2. Requisites and Sufficiency of Sentencing Procedure

§ 1747. Information considered—Disclosure; opportunity to rebut

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4705 to 4708, 4716

Due process generally requires that a defendant be given an opportunity to rebut the factual assumptions relied on by the sentencing judge, and the requirements of due process are satisfied by disclosing the presentence report to the offender and allowing him or her an opportunity to refute or rebut the findings made in the report.

Suppression by the government of evidence favorable to an accused violates due process[1] where the defendant does not already have ready access to the evidence,[2] and where such evidence is material either to guilt or to punishment,[3] such that its suppression is prejudicial to the defendant.[4] Although the prosecutor has no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor,[5] under the *Brady*[6] rule, the suppression by the prosecution of evidence favorable to an accused upon request for disclosure violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.[7]

Due process ordinarily requires that the defendant be given an opportunity to rebut the factual assumptions relied on by the sentencing judge.[8] A defendant's due process rights are violated where the court, in violation of a statute, fails to disclose to

defense counsel or the defendant a part of the factual contents of a presentence report,[9] especially where the sentencing decision manifestly was affected by the missing information.[10] The requirements of due process are satisfied, however, by disclosing the presentence report to the offender and allowing him or her an opportunity to refute the investigator's findings.[11]

In a case where a death sentence might be imposed, due process requires that confidential information which is in a presentence report be disclosed.[12] Sending a defendant to his or her death on the basis of information in a presentence report which the defendant has no opportunity to deny or explain violates fundamental notions of due process.[13] Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, the defendant must be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death on the basis of information which he had no opportunity to deny or explain. U.S.C.A. Const. Amend. 5; 18 U.S.C.A. § 3593(c).[14]

Consideration of information from unidentified informants.

The nature of a presentence report necessitates relying upon hearsay information to a great extent,[15] and due process does not prohibit the use in sentencing of information from unidentified informants where there is good cause for nondisclosure, there is sufficient corroboration by other means, and the defendant is given an opportunity to demonstrate that the information is inaccurate or incomplete.[16]

Findings relating to restitution.

Due process requires that a criminal defendant be given an opportunity to contest the information on which a restitution award is based.[17] The requirements of due process are satisfied by disclosing the presentence report to the offender and allowing him or her an opportunity to refute the investigator's findings with respect to matters such as the ability to make restitution and to present evidence of his or her inability to comply.[18]

Footnotes

1 La.—State v. Miller, 923 So. 2d 625 (La. 2006).

2 La.—State v. Odenbaugh, 82 So. 3d 215 (La. 2011).

3 U.S.—U.S. v. Sourlis, 953 F. Supp. 568 (D.N.J. 1996).
No violation of due process shown
A defendant was not denied due process at the time he was sentenced, when the prosecuting attorney introduced adverse information about the defendant which was not contained in the presentence report, where the court stated explicitly, on two occasions, that it did not intend to rely in any way on allegations made by the prosecuting attorney as to the information and did not rely in any way on information the government allegedly obtained from a deceased witness.
U.S.—Gerry v. U.S., 765 F. Supp. 767 (D. Me. 1991).

4 Mo.—Taylor v. State, 262 S.W.3d 231 (Mo. 2008).

5 U.S.—U.S. v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) (holding modified on other grounds by, U.S. v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)).

6 U.S.—Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

7 U.S.—Boyde v. California, 494 U.S. 370, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990); Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

8 U.S.—U.S. v. Cesaitis, 506 F. Supp. 518 (E.D. Mich. 1981).
Mont.—State v. Mainwaring, 2007 MT 14, 335 Mont. 322, 151 P.3d 53 (2007).

Wyo.—Capellen v. State, 2007 WY 107, 161 P.3d 1076 (Wyo. 2007).

9 Nev.—Shields v. State, 97 Nev. 472, 634 P.2d 468 (1981).

Under federal statute

If the defendant has entered a plea of guilty or nolo contendere or has been found guilty, the court must assure that a presentence report is disclosed to the defendant, the counsel for the defendant, and the attorney for the government at least 10 days prior to the date set for sentencing unless this minimum period is waived by the defendant.

18 U.S.C.A. § 3552(d).

Under Federal Rules of Criminal Procedure

(1) The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

Fed. R. Crim. P. 32(e)(2).

(2) At sentencing, the court must give to the defendant and an attorney for the government a written summary of, or summarize in camera, any information excluded from the presentence report under Fed. R. Crim. P. 32(d)(3) on which the court will rely in sentencing and give them a reasonable opportunity to comment on that information.

Fed. R. Crim. P. 32(i)(1)(B).

A.L.R. Library

Defendant's right to disclosure of presentence report, 40 A.L.R.3d 681.

Statements of persons other than defendant as subject to discovery by defendant under Rule 16 of Federal Rules of Criminal Procedure, 115 A.L.R. Fed. 573.

Defendant's confessions and statements, other than oral statements within Rule 16(a)(1)(A), as subject to discovery by defendant under Rule 16 of Federal Rules of Criminal Procedure, 111 A.L.R. Fed. 197.

Reports of tests, experiments, or analyses as subject to discovery by defendant under Rule 16 of Federal Rules of Criminal Procedure, 110 A.L.R. Fed. 313.

Illegal drugs or narcotics involved in alleged offense as subject to discovery by defendant under Rule 16 of Federal Rules of Criminal Procedure, 109 A.L.R. Fed. 363.

Books, papers, and documents subject to discovery by defendant under Rule 16 of Federal Rules of Criminal Procedure, 108 A.L.R. Fed. 380.

10 Nev.—Shields v. State, 97 Nev. 472, 634 P.2d 468 (1981).

Victim impact statement

Where a victim impact statement includes references to specific prior acts of the defendant, due process requires that the accuser be under oath and that there be an opportunity for cross-examination.

Nev.—Buschauer v. State, 106 Nev. 890, 804 P.2d 1046 (1990).

11 W. Va.—Fox v. State, 176 W. Va. 677, 347 S.E.2d 197 (1986).

12 U.S.—Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).

Fla.—Harvard v. State, 414 So. 2d 1032 (Fla. 1982).

Minn.—State v. Adams, 295 N.W.2d 527 (Minn. 1980).

S.D.—State v. Berget, 2013 SD 1, 826 N.W.2d 1 (S.D. 2013).

As to due process considerations with respect to the death penalty, generally, see § 1742.

13 U.S.—Simmons v. South Carolina, 512 U.S. 154, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994); U.S. v. Troya, 733 F.3d 1125, 92 Fed. R. Evid. Serv. 660 (11th Cir. 2013), petition for certiorari filed, 2015 WL 1959125 (U.S. 2015) and petition for certiorari filed, 2015 WL 1959126 (U.S. 2015).

14 U.S.—U.S. v. Troya, 733 F.3d 1125, 92 Fed. R. Evid. Serv. 660 (11th Cir. 2013), petition for certiorari filed, 2015 WL 1959125 (U.S. 2015) and petition for certiorari filed, 2015 WL 1959126 (U.S. 2015).

15 § 1746.

16 U.S.—U.S. v. Fatico, 603 F.2d 1053 (2d Cir. 1979).

Wash.—State v. Russell, 31 Wash. App. 646, 644 P.2d 704 (Div. 1 1982).

17 Ariz.—State v. Lewus, 170 Ariz. 412, 825 P.2d 471 (Ct. App. Div. 1 1992).

18 W. Va.—Fox v. State, 176 W. Va. 677, 347 S.E.2d 197 (1986).

Notice and opportunity to be heard

Wash.—State v. Deskins, 180 Wash. 2d 68, 322 P.3d 780 (2014), as amended, (June 5, 2014).

Violation of due process shown

Ordering restitution based on a victim's privileged medical records violated due process; the defendant had a right to a summary of the specific facts or access to records relied upon so that he could rebut the facts, and the court's summary failed to disclose the facts specifically relating to the charge.
N.H.—State v. Eno, 143 N.H. 465, 727 A.2d 981 (1999).

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16C C.J.S. Constitutional Law § 1748

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J. Judgment, Sentence, and Punishment; Appeal and Error

2. Requisites and Sufficiency of Sentencing Procedure

§ 1748. Delay in sentencing or incarceration

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4718

Due process prohibits an inordinate delay in sentencing proceedings when the delay causes prejudice to the defendant.

The principles of fundamental fairness dictated by the Due Process Clause prohibit an inordinate delay in sentencing proceedings when the delay causes substantial and demonstrable[1] prejudice to the defendant.[2] When determining whether a delay in a sentencing trial violates due process, prejudice is measured by the extent, if any, the delay would jeopardize the viability of an accused's defense at the penalty phase trial.[3] Also, where there is a significant delay in the imposition of an original sentence from a conviction, the subsequent impairment of a defendant's right to appeal his or her conviction and sentence can result in a denial of due process that prejudices a defendant.[4] However, no violation of due process exists where the delay is not purposeful and oppressive but is instead accidental and has been remedied when discovered.[5]

Delay in incarceration.

Under the Fourteenth Amendment's protection against arbitrary and capricious government action, a state may waive jurisdiction by delaying incarceration of a prisoner for an inordinate amount of time.[6] However, only "conscience-shocking" actions of executive officials will implicate the substantive component of the Due Process Clause, and a relatively high degree of culpability is required to shock the conscience in this context.[7] Certainly, a state does not deny a prisoner due process as a result of a delay in incarceration, when the prisoner himself or herself is responsible for the delay.[8]

Footnotes

1 U.S.—U.S. v. Paul, 634 F.3d 668 (2d Cir. 2011).

2 La.—State v. Duncan, 396 So. 2d 297 (La. 1981).

Prejudice not shown

La.—State v. Hicks, 30 So. 3d 1081 (La. Ct. App. 2d Cir. 2010), writ denied, 45 So. 3d 1071 (La. 2010).

3 Ind.—State v. Azania, 865 N.E.2d 994 (Ind. 2007), decision clarified on other grounds on reh'g, 875 N.E.2d 701 (Ind. 2007).

4 Ky.—Perdue v. Com., 82 S.W.3d 909 (Ky. 2002).

5 U.S.—Pollard v. U.S., 352 U.S. 354, 77 S. Ct. 481, 1 L. Ed. 2d 393 (1957).

A.L.R. Library

Loss of jurisdiction by delay in imposing sentence, 98 A.L.R.3d 605.

What constitutes "unreasonable delay" within meaning of Rule 32(a)(1) of Federal Rules of Criminal Procedure, providing that sentence shall be imposed without unreasonable delay, 52 A.L.R. Fed. 477.

6 U.S.—Bonebrake v. Norris, 417 F.3d 938 (8th Cir. 2005).

7 U.S.—Bonebrake v. Norris, 417 F.3d 938 (8th Cir. 2005).

8 U.S.—Bonebrake v. Norris, 319 F. Supp. 2d 928 (E.D. Ark. 2003), order rev'd on other grounds, 417 F.3d 938 (8th Cir. 2005).

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16C C.J.S. Constitutional Law § 1749

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

2. Requisites and Sufficiency of Sentencing Procedure

§ 1749. Correcting, modifying, or revising sentence

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4726

A court ordinarily may correct an illegal sentence, resulting in additional incarceration, without violating the defendant's right to due process.

Where a court corrects an illegal sentence, resulting in additional incarceration, there ordinarily is no violation of the defendant's right to due process.[1] In determining whether the resentencing of a defendant to a harsher sentence, in order to correct an earlier mistake, is so unfair that it violates due process, the defendant's interests in finality must be weighed against the State's interests in correction of the mistake, and the probability of a court resentencing in a vindictive manner after the defendant successfully appeals or petitions for postconviction relief must also be weighed.[2] In cases in which an increase to the defendant's sentence is due to a legally incomplete sentence rather than in response to a mistake of fact, a change of heart, or vindictiveness, there is no due process or other constitutional violation.[3]

A statute creating a sentence review system, which permits the review division to increase sentences, does not violate due process.[4] Due process requires a sentencing court to communicate clearly to the defendant the exact nature of the sentence as well as the extent to which the court retains discretion to modify it or impose it at a later date,[5] and a sentence review procedure

is constitutional where the statute gives adequate notice that the review panel can find sentences unjust because they are too short, as well as because they are too long.[6] If, at a resentencing to correct an illegal sentence, the trial judge has discretion as to the convictions to be vacated or the sentence to be imposed, the defendant has a due process right to be present and allocute.[7]

A statute precluding the trial judge from reconsidering or modifying a death sentence imposed pursuant to jury determination does not violate due process even though a noncapital defendant is entitled, upon timely request, to reconsideration of his or her sentence since a capital defendant is entitled to numerous other safeguards.[8]

Resentencing to add a period of postrelease supervision prior to completion of a sentence does not violate due process[9] even where defendant has completed the vast majority of his or her sentence at the time of resentencing.[10]

Delay in correcting or reducing sentence.

Delays in correcting erroneous sentences or in ruling on motions to reduce sentences do not violate due process where such delays are not prejudicial or unreasonable.[11] However, the power of a sentencing court to correct an invalid sentence must be subject to some temporal limit,[12] and there may be circumstances under which even a corrected illegal sentence may be fundamentally unfair and thus violative of due process.[13] For example, after a substantial period of time in confinement, it might be fundamentally unfair and thus violative of due process for a court to alter a sentence in a way which frustrates a prisoner's expectations by postponing his or her parole eligibility or release date far beyond that originally set.[14]

CUMULATIVE SUPPLEMENT

Cases:

Trial court did not violate defendant's due process rights when reducing defendant's sentence for soliciting murder based on substantial post-conviction assistance to government without making findings on disputed or controverted matters, specifically, whether defendant in fact solicited murders; court did not reduce defendant's sentence at sentencing, and court did not rely on materially false or unreliable information in reducing sentence, but rather court relied on facts to which the parties had stipulated. U.S. Const. Amend. 14; Fed. R. Crim. P. 32(i)(3), 35(b). United States v. Doe, 987 F.3d 1216 (9th Cir. 2016), cert. denied, 139 S. Ct. 1218, 203 L. Ed. 2d 237 (2019).

Resentencing of defendant as aider and abettor in felony murder after he had been convicted, in state court, as principal for the murder, upon a finding, after trial, that he was not the shooter, did not violate defendant's Due Process rights under Fifth Amendment, or his right to fair trial under Sixth Amendment; at trial, prosecutor argued and jury considered evidence supporting finding that defendant was guilty of felony murder under aiding and abetting theory as well as under theory that he was shooter, jury found that defendant had specific intent to commit robbery and that person was killed during the attempt or commission of that robbery, as required to support conviction for felony murder under aider and abettor theory, and, although jury incorrectly identified defendant as shooter, sentencing judge had no reason to assume that jury had affirmatively rejected theory that defendant had served as lookout as invalid. U.S.C.A. Const. Amends. 5, 6; 28 U.S.C.A. § 2254(d); West's Ann.Cal.Penal Code §§ 187(a), 190.2(a)(17). Taylor v. Beard, 811 F.3d 326 (9th Cir. 2016).

District court, after granting a motion to vacate, set aside, or correct sentence, has broad discretion to choose between the remedies of resentencing or correcting the sentence, but the Due Process Clause places a limit on that discretion. U.S. Const. Amend. 5; 28 U.S.C.A. § 2255. United States v. Thomason, 940 F.3d 1166 (11th Cir. 2019).

Aggregate sentence of 105 to 125 years' imprisonment for two felony-murders, an attempted murder and robbery, conspiracy, and weapons offenses during crime spree when defendant was 15 was not vindictive after successful appeal from sentence of life imprisonment imposed by different judge and did not violate due process, although sentences for murder and attempted murder changed from concurrent to consecutive; sentencing judge weighed required factors, considered defendant's role as person who was not shooter, considered decreased cognitive ability due to age and immaturity, imposed sentences at low end of statutory range, but did not overlook involvement in three distinct incidents of gun violence that resulted in the deaths of two people and the wounding of a third. U.S. Const. Amend. 14; Neb. Rev. Stat. § 28-105.02. State v. Castaneda, 295 Neb. 547, 889 N.W.2d 87 (2017).

[END OF SUPPLEMENT]

Footnotes

1 Alaska—State v. Price, 715 P.2d 1183 (Alaska Ct. App. 1986).

Correction making sentences consecutive rather than concurrent

A defendant's due process rights were not violated by the trial court's correction of a judgment to reflect that the sentences imposed were consecutive rather than concurrent, even though the trial court did not make a correction until eight months after the original judgment and sentence were final, where the defendant was present when the trial court pronounced that sentences were consecutive, the trial court was merely correcting a clerical error, the record contained no evidence of vindictiveness or retaliation, and consecutive sentences were statutorily required due to the defendant's guilty plea to charges pending at time he committed the offense at issue.

Ky.—Cardwell v. Com., 12 S.W.3d 672 (Ky. 2000).

Correction to include statutorily mandated term

The trial court's correction of a defendant's unauthorized sentence for second-degree criminal sexual conduct, to include a statutorily mandated conditional release term, did not violate the defendant's rights to due process and protection from double jeopardy.

Minn.—State v. Humes, 581 N.W.2d 317 (Minn. 1998).

A.L.R. Library

Power of court to increase severity of unlawful sentence—modern status, 28 A.L.R.4th 147.

2 N.D.—State v. Trieb, 533 N.W.2d 678 (N.D. 1995).

Due process limits on modification of sentence

There are due process limits on a court's ability to modify a sentence to correct an error; however, such cases will be rare.

Minn.—State v. Calmes, 632 N.W.2d 641 (Minn. 2001).

3 Ohio—State v. Simpkins, 117 Ohio St. 3d 420, 2008-Ohio-1197, 884 N.E.2d 568 (2008).

4 U.S.—Robinson v. Warden, Md. House of Correction, 455 F.2d 1172 (4th Cir. 1972).

Mont.—State v. Henrich, 162 Mont. 114, 509 P.2d 288 (1973).

Particular contentions

A sentence review division had authority to increase sentences despite the contention that the possibility of increased sentences chilled the right of appeal and created a realistic likelihood of vindictiveness, thus violating due process.

N.H.—Bell v. State, Superior Court Sentence Review Division, 117 N.H. 474, 374 A.2d 659 (1977).

5 N.H.—State v. Mottola, 166 N.H. 173, 90 A.3d 1234 (2014).

6 U.S.—Robinson v. Warden, Md. House of Correction, 455 F.2d 1172 (4th Cir. 1972).

7 D.C.—Mooney v. U.S., 938 A.2d 710 (D.C. 2007).

8 Md.—Burch v. State, 358 Md. 278, 747 A.2d 1209 (2000).

9 N.Y.—People v. Brinson, 90 A.D.3d 670, 933 N.Y.S.2d 728 (2d Dep't 2011).

Ohio—State v. Simpkins, 117 Ohio St. 3d 420, 2008-Ohio-1197, 884 N.E.2d 568 (2008).

10 Ohio—State v. Simpkins, 117 Ohio St. 3d 420, 2008-Ohio-1197, 884 N.E.2d 568 (2008).

11 U.S.—Cook v. U.S., 426 F.2d 1358 (5th Cir. 1970); U.S. v. Smith, 650 F.2d 206 (9th Cir. 1981).
Haw.—State v. Fry, 61 Haw. 226, 602 P.2d 13 (1979).
Due process rights not violated
A defendant's due process rights were not violated when, 15 minutes after the initial sentencing, the trial court modified the sentence to correct its misstatement about the amount of time that had to be served before the sentence was suspended, where there was no indication that the court increased the sentence as a result of vindictiveness or some other improper motive, and the court went so far as to reduce the modified sentence to compensate the defendant for any anguish he may have suffered as result of the change in the sentence; moreover, the defendant's expectations as to the finality of the sentence could not have so crystallizedin 15 minutes that it was fundamentally unfair to defeat them.
Va.—Nelson v. Com., 12 Va. App. 835, 407 S.E.2d 326 (1991).

12 U.S.—Breest v. Helgemoe, 579 F.2d 95 (1st Cir. 1978).
Haw.—State v. Delmondo, 67 Haw. 531, 696 P.2d 344 (1985).

13 Haw.—State v. Delmondo, 67 Haw. 531, 696 P.2d 344 (1985).

14 U.S.—Breest v. Helgemoe, 579 F.2d 95 (1st Cir. 1978).

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16C C.J.S. Constitutional Law § 1750

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

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J. Judgment, Sentence, and Punishment; Appeal and Error

2. Requisites and Sufficiency of Sentencing Procedure

§ 1750. Sentence on withdrawal of plea of guilty, retrial, or trial de novo

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4725

The imposition of a harsher sentence than had been originally imposed upon the acceptance of a defendant's prior plea of guilty, or upon an earlier conviction as to which a retrial has been granted, generally does not deny the defendant due process, but due process requires that vindictiveness against a defendant for having withdrawn a guilty plea or successfully attacking a conviction play no part in sentencing.

In general, the imposition of a harsher sentence following conviction than had been originally imposed upon the acceptance of the defendant's prior plea of guilty does not deny a defendant due process.[1] Furthermore, where a defendant withdraws or successfully overturns his or her plea of guilty to a lesser-included offense, which was entered as the result of a plea bargain, and a more severe sentence is imposed after a trial on the greater charge than was imposed on the plea of guilty, due process is not offended.[2] Likewise, due process does not forbid enhanced sentences or charges upon retrial.[3]

However, the Due Process Clause forbids imposition of criminal punishment on a defendant because of his or her exercise of a legal right,[4] and fundamental notions of fairness embodied in the concept of due process require that convicted defendants be freed of the apprehension of such retaliatory motivation.[5] Due process therefore requires that vindictiveness against a defendant

for having successfully attacked his or her first conviction play no part in the sentence that he or she receives after a new trial.[6] Thus, it is impermissible, under the Due Process Clause, for a sentencing authority to mete out higher sentences on retrial as punishment for those who successfully exercise their right to appeal or to attack collaterally their convictions.[7]

In order to be valid under due process principles, an increased punishment generally must be based on objective information concerning identifiable conduct on the part of defendant occurring after the time of the original sentencing proceeding.[8] Intervening convictions of the defendant, based on indictments pending at the time of the original sentencing and on conduct predating that sentence, cannot satisfy this requirement, nor can material specifically not relied on by the sentencing judge.[9]

Where a judge does impose a harsher sentence following retrial, some reasons for the increase must be set out in the record so that it is plain that no vindictiveness is involved.[10]

Trial de novo.

A judicial system, under which a defendant convicted in an inferior court can obtain a trial in a superior court, does not deny due process even though a greater penalty can be imposed upon the trial de novo[11] where it does not appear that the imposition of the greater penalty results from judicial vindictiveness.[12]

CUMULATIVE SUPPLEMENT

Cases:

District court's conduct on remand, after the Court of Appeals had affirmed the four accessing child pornography convictions for which defendant received a 240-month sentence, reversed his conviction for engaging in a child exploitation enterprise, for which he received a concurrent 300-month sentence, and remanded for resentencing, in imposing consecutive 75-month sentences for each accessing conviction, such that defendant's total sentence was the same sentence that he received prior to appealing, raised no presumption of vindictiveness and did not violate defendant's due process rights. U.S. Const. Amend. 5; 18 U.S.C.A. § 2252A(a)(5)(b). United States v. DeFoggi, 878 F.3d 1102 (8th Cir. 2018).

Sentencing court was not required to make specific findings of fact regarding defendant's age-related characteristics when it resentenced defendant, who was 16 at the time he committed offense for which he pleaded no contest to first degree murder and was sentenced to life imprisonment, to a sentence of 80 years' to life imprisonment with parole eligibility when defendant was 56 years of age, and thus defendant's due process rights were not violated, although out-of-state courts required certain findings of fact; *Miller v. Alabama* did not impose a formal fact-finding requirement where a sentence included possibility of parole, defendant was not sentenced to life imprisonment without parole, and court considered statutory and customary sentencing factors. U.S. Const. Amend. 14; Neb. Rev. Stat. § 28-105.02(2). State v. Jones, 297 Neb. 557, 900 N.W.2d 757 (2017).

Resentencing judge's reasons for defendant's more severe sentence on remand following reversal of his conviction and sentence for second-degree kidnapping were non-vindictive, and, thus, harsher sentence did not violate due process, where resentencing judge stated that upward durational departure would be imposed based on jury's findings of four enhancement factors on first-degree kidnapping conviction that had not been alleged or found during original trial. U.S. Const. Amend. 14. State v. Sierra, 361 Or. 723, 399 P.3d 987 (2017).

Defendant's due process rights were not violated due to vindictiveness of sentencing court that resentenced defendant to the same 75-month term of imprisonment for first degree sexual abuse that defendant received initially, but increased defendant's initial sentence for furnishing alcohol to a minor from 60-month term of probation to a 12-month term of imprisonment on remand, even though the same judge sentenced defendant both times; fact that the judge was the same was not a basis for a

presumption that the court acted with improper vindictive motive, aggregate total length of defendant's sentence decreased from 170-month term of imprisonment and 60-month term of probation to an 87-month term of imprisonment, and defendant did not present any other evidence that court acted vindictively. U.S. Const. Amend. 14; Or. Rev. Stat. §§ 163.427, 471.410(2). State v. Febuary, 361 Or. 544, 396 P.3d 894 (2017).

[END OF SUPPLEMENT]

Footnotes

1 Ga.—Ladd v. State, 228 Ga. 113, 184 S.E.2d 158 (1971).

2 Md.—Sweetwine v. State, 42 Md. App. 1, 398 A.2d 1262 (1979), judgment aff'd, 288 Md. 199, 421 A.2d 60, 14 A.L.R.4th 956 (1980).

Minn.—Beltowski v. State, 289 Minn. 215, 183 N.W.2d 563 (1971).

Imposition of consecutive sentences

Imposition of consecutive sentences when the defendants were resentenced following remand did not violate their due process rights where the defendants' sentences were either significantly shorter or substantially similar to their prior sentences and where there was no indication that the district court resentenced them to consecutive sentences in order to punish them.

U.S.—U.S. v. Davis, 329 F.3d 1250 (11th Cir. 2003).

Longer sentence not vindictive

A longer sentence imposed upon a defendant upon a second rape conviction, following a successful appeal from a first conviction, was not the result of vindictiveness and did not violate the defendant's due process rights, where the original, lower sentence had been given in return for a guilty plea to protect the victim from the trauma of testifying, and the defendant, on retrial, elected to have a jury trial, thus requiring the victim to testify publicly.

N.Y.—People v. Miller, 65 N.Y.2d 502, 493 N.Y.S.2d 96, 482 N.E.2d 892 (1985).

3 Neb.—State v. Wilson, 252 Neb. 637, 564 N.W.2d 241 (1997).

"Aggregate package" analysis employed

When analyzing a due process claim that a resentencing raises a presumption of vindictiveness when the defendant receives more prison time than he or she did before his or her first, successful appeal, the court of appeals follows the "aggregate package" approach, under which it compares the total original punishment to the total punishment after resentencing in determining whether the new sentence is more severe.

U.S.—U.S. v. Rivera, 327 F.3d 612 (7th Cir. 2003).

4 U.S.—U.S. v. Walker, 514 F. Supp. 294, 60 A.L.R. Fed. 734 (E.D. La. 1981).

Mo.—State ex rel. Patterson v. Randall, 637 S.W.2d 16 (Mo. 1982).

Mont.—State v. Baldwin, 192 Mont. 521, 629 P.2d 222 (1981).

Penalty for exercising protected statutory or constitutional right

U.S.—U.S. v. Horob, 735 F.3d 866 (9th Cir. 2013).

5 U.S.—Chaffin v. Stynchcombe, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973).

Neb.—State v. Miller, 284 Neb. 498, 822 N.W.2d 360 (2012).

Freedom from fear of retaliation required

Since fear of vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his or her first conviction, due process also requires that the defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

Kan.—State v. Rinck, 260 Kan. 634, 923 P.2d 67 (1996).

6 U.S.—U.S. v. Johnson, 715 F.3d 179 (6th Cir. 2013).

Ga.—Adams v. State, 287 Ga. 513, 696 S.E.2d 676 (2010).

Iowa—State v. Harrington, 805 N.W.2d 391 (Iowa 2011).

Minn.—State v. Vang, 847 N.W.2d 248 (Minn. 2014).

"Vindictiveness" defined

"Vindictiveness" is the imposition of a punishment against a defendant for the purpose of retaliating against him or her for the exercise of legal rights rather than for the purpose of imposing a sanction on the defendant for crimes he or she has committed.

U.S.—U.S. v. Walker, 514 F. Supp. 294, 60 A.L.R. Fed. 734 (E.D. La. 1981).

7 U.S.—Chaffin v. Stynchcombe, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973).

Fla.—Herring v. State, 411 So. 2d 966 (Fla. 3d DCA 1982).

Remedy for violation of right to due process

With respect to a defendant who pleaded nolo contendere to the sale of illegal drugs, the remedy for the trial court's violating the defendant's right to due process, which occurred by its increasing his sentence in retaliation for the defendant's pursuing a suppression motion, would be to grant the defendant a new sentencing hearing or allow him to withdraw his plea rather than to grant him specific performance of the sentence offered by the trial court prior to the denial of his suppression motion.

Conn.—State v. Revelo, 256 Conn. 494, 775 A.2d 260 (2001).

8 U.S.—Somerville v. Hunt, 695 F.3d 218 (2d Cir. 2012).

Mont.—State v. Bullplume, 2011 MT 40, 359 Mont. 289, 251 P.3d 114 (2011).

Neb.—State v. Miller, 284 Neb. 498, 822 N.W.2d 360 (2012).

Wyo.—Turner v. State, 624 P.2d 774 (Wyo. 1981).

No violation of due process shown

(1) A defendant's due process rights were not violated by the imposition of an increased sentence upon resentencing after his partially successful appeal; the lower court's determination by a preponderance of the evidence that the defendant murdered a government witness, based upon testimony of another witness that came forward after the initial sentence was imposed, was sufficient to overcome the presumption of vindictiveness by the trial court against the defendant.

U.S.—U.S. v. Bryce, 287 F.3d 249 (2d Cir. 2002).

(2) Even though a defendant had originally received a sentence of 25 years with 13 years suspended upon a plea of guilty, where the defendant was allowed to withdraw his plea and was then tried and convicted, and evidence at trial, which was not apparent at the time of the guilty plea, showed that the defendant had planned, instigated, and been ringleader in the crime, the defendant was not deprived of due process in the imposition after trial of a harsher imprisonment consisting of a sentence of 25 years, of which five years were suspended.

Miss.—Rufus v. State, 402 So. 2d 874 (Miss. 1981).

9 U.S.—U.S. v. Markus, 603 F.2d 409 (2d Cir. 1979).

10 U.S.—Somerville v. Hunt, 695 F.3d 218 (2d Cir. 2012).

Del.—Jacobs v. State, 358 A.2d 725 (Del. 1976).

Mont.—State v. Bullplume, 2011 MT 40, 359 Mont. 289, 251 P.3d 114 (2011).

Neb.—State v. Miller, 284 Neb. 498, 822 N.W.2d 360 (2012).

Logical, nonvindictive reasons for sentence

When a different judge sentences a defendant after a retrial, and that judge articulates logical, nonvindictive reasons for the sentence, there is no sound basis to presume that the sentence is the product of judicial vindictiveness in violation of the constitutional guarantee of due process.

Conn.—Connelly v. Commissioner of Correction, 258 Conn. 374, 780 A.2d 890 (2001).

Reliance on presentence report

An increased sentence after a second trial did not violate the defendant's due process rights where the judge placed in the record and relied upon a presentence report which showed only negative information and which showed no factors that the trial judge should not have relied upon.

U.S.—U.S. v. Lincoln, 581 F.2d 200 (9th Cir. 1978).

Presumption of vindictiveness from failure to state reason for sentence

A defendant's right to due process was violated when the trial court imposed harsher sentences on the remaining counts, on remand after the defendant successfully challenged a conviction on a third count; there was a presumption of vindictiveness under the circumstances, and the trial court did not articulate a reason on the record for the new enhanced sentences and relied primarily upon information that was considered in the imposition of the original sentences.

Kan.—State v. Rinck, 260 Kan. 634, 923 P.2d 67 (1996).

11 U.S.—Colten v. Kentucky, 407 U.S. 104, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972).

12 U.S.—Colten v. Kentucky, 407 U.S. 104, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972).
Me.—State v. Smith, 437 A.2d 639 (Me. 1981).
N.H.—State v. Koski, 120 N.H. 112, 411 A.2d 1122 (1980).

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16C C.J.S. Constitutional Law § 1751

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Constitutional Law
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J. Judgment, Sentence, and Punishment; Appeal and Error

2. Requisites and Sufficiency of Sentencing Procedure

§ 1751. Enhanced or extended sentence

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4705, 4709, 4716

Due process principles apply to the determination of the new matter upon which a valid extension of a sentence term rests, as well as the procedure by which a defendant is determined to be a dangerous special, or similarly designated, offender.

The due process clause generally requires that a defendant have notice, prior to trial, of the State's intention to seek an enhanced sentence under state statutes.[1] However, due process does not necessarily require that the State give particular defendants individual pretrial notice that they may be subject to extended term sentencing.[2] Moreover, an offender appealing a sentence enhancement on the basis of defective notice must show the error was prejudicial.[3]

In general, due process applies to the procedure by which a defendant is determined to be a dangerous special, or similarly designated, offender[4] and guarantees the defendant notice,[5] the opportunity to be heard, and the right to confrontation and cross-examination of witnesses.[6] If a sentencing court endeavors to enhance a sentence beyond that which is jointly recommended by the parties based on a fact which the defendant disputes and for which the prosecutor cannot advocate, the court must, on its

own motion, as a matter of due process, assure itself that the information establishing the sentence-enhancing fact is reliable, accurate, and trustworthy and must provide the defendant with an effective opportunity to rebut the allegation.[7]

In sentencing a defendant, use of the preponderance of the evidence standard to determine sentence enhancement does not violate the defendant's due process rights.[8] However, if a dangerous special offender sentencing statute authorizes the government to make new and separate criminal charges, due process requires that a finding that the defendant is a dangerous special offender must be based on proof beyond a reasonable doubt.[9]

CUMULATIVE SUPPLEMENT

Cases:

There was sufficient evidence that defendant convicted of being felon in possession of firearm possessed three to five firearms to support two-level enhancement under Sentencing Guidelines, in light of evidence that defendant had actual possession of handgun that was recovered from his person during traffic stop, that three firearms were recovered during search of property at which he stayed on regular occasions, that defendant had been seen shooting weapons near property, and that firearms found on property were part of same burglary scheme pursuant to which he obtained handgun. U.S.S.G. § 2K2.1(b)(1)(A). United States v. Gattis, 877 F.3d 150 (4th Cir. 2017).

Defendant's knowledge of the firearms and dominion over defendant's mother's residence were sufficient to establish his constructive possession of the revolver and four long guns found inside the house, and thus warranted two-level enhancement to his sentence for being a felon in possession of a firearm, for an offense involving between three and seven firearms; mail was found at the home with defendant's name on it, neighbors and family members testified that defendant lived at the house with his mother, and he used his mother's address when he was booked into custody. U.S.S.G. § 2K2.1(b)(1)(A). United States v. Goldsberry, 888 F.3d 941 (8th Cir. 2018).

District court did not deny defendant due process by applying, sua sponte, a two-point obstruction-of-justice enhancement to his sentence for encouraging and inducing aliens to enter United States, on ground defendant had knowingly suborned perjurious testimony of Cuban migrants denying that defendant aided their entry into United States in any way; defendant had adequate notice of the conduct underlying the court's sua sponte decision, as defense counsel's opening statement indicated that migrant witnesses would deny defendant's involvement in their illegal entry, defendant sat idly as the witnesses told a similar story contradicting the record, and before his sentencing hearing, the government provided notice that it intended to seek an upward variance in part because of the witnesses' perjured testimony. U.S. Const. Amend. 5; U.S.S.G. § 3C1.1. United States v. Plasencia, 886 F.3d 1336 (11th Cir. 2018).

[END OF SUPPLEMENT]

Footnotes

1 Wash.—State v. Tuttle, 26 Wash. App. 382, 612 P.2d 823 (Div. 1 1980).
As to notice required by due process with respect to habitual offender, recidivist, or repeat or successive offender proceedings, generally, see § 1752.
Notice sufficient
Notice to defendant on first day of trial that prosecution would seek extended term of imprisonment if defendant was convicted of any of four charges pending, following notice 10 days prior to trial that extended term would be sought if defendant was convicted of one of four charges, did not violate due process

under state constitution or Fourteenth Amendment, where statute on extension of imprisonment allowed prosecution to serve notice of intent to seek extended term on first day of trial, and earlier notice, which was sought on same basis of earlier imprisonment, gave defendant ample opportunity to provide evidence to refute basis for seeking extended term.

N.H.—State v. Reid, 134 N.H. 418, 594 A.2d 160 (1991).

2 N.H.—Stewart v. Cunningham, 131 N.H. 68, 550 A.2d 96 (1988).

3 N.D.—State v. Carpenter, 2011 ND 20, 793 N.W.2d 765 (N.D. 2011).

Tex.—Villescas v. State, 189 S.W.3d 290 (Tex. Crim. App. 2006).

4 U.S.—U.S. v. Inendino, 463 F. Supp. 252 (N.D. Ill. 1978).

As to the validity of dangerous special offender statutes under due process principles, generally, see § 1743.

Failure to provide fair warning

A hate crime penalty statute, under which the trial court enhanced the defendants' sentences on their convictions for aggravated assault and other offenses, failed to provide fair warning to the defendants of the conduct it prohibited, and impermissibly delegated basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications; the statute was unconstitutionally vague under the federal and state constitutions, since the broad language of statute encompassed every possible partiality or preference, by enhancing all offenses where a victim or his or her property had been selected because of any bias or prejudice.

Ga.—Botts v. State, 278 Ga. 538, 604 S.E.2d 512 (2004).

Due process not violated

(1) It does not violate a defendant's substantive due process right when he or she is classified as a violent felony offender, and thereby subjected to an extended term of imprisonment, based upon his or her conviction of an enumerated violent felony within previous five years, even though his or her present offense is nonviolent felony.

Fla.—Hale v. State, 630 So. 2d 521 (Fla. 1993).

(2) A statute authorizing an extended-term sentence for aggravated battery, based upon the existence of certain facts that were not submitted to a jury for proof beyond a reasonable doubt regarding the exceptionally brutal or heinous nature of the crime, did not violate due process and thus was not unconstitutional on its face; circumstances existed under which the statute was valid, which rendered the statute constitutional on its face.

Ill.—People v. Jackson, 199 Ill. 2d 286, 263 Ill. Dec. 819, 769 N.E.2d 21 (2002).

5 Minn.—State v. Adams, 295 N.W.2d 527 (Minn. 1980).

Sufficiency of notice

Where a notice of intent to seek a finding of dangerous special offender status did not set forth with particularity the reason for the State's belief that the defendant was a dangerous, mentally abnormal person, it did not meet the requirements of a dangerous special offender statute.

N.D.—State v. Wells, 276 N.W.2d 679 (N.D. 1979).

6 Minn.—State v. Adams, 295 N.W.2d 527 (Minn. 1980).

7 Kan.—State v. Easterling, 289 Kan. 470, 213 P.3d 418 (2009).

8 U.S.—U.S. v. Gonzalez-Vazquez, 34 F.3d 19 (1st Cir. 1994).

9 U.S.—U.S. v. Duardi, 384 F. Supp. 874 (W.D. Mo. 1974), judgment aff'd, 529 F.2d 123 (8th Cir. 1975).

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Constitutional Law
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§ 1752. Enhanced or extended sentence—Habitual offenders; recidivists; repeat or successive offenders

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4729

Substantial due process protection generally is required in recidivist proceedings.

Substantial due process protection generally is required in recidivist proceedings.[1] However, habitual offender proceedings are not required, under due process, to include the full panoply of rights afforded a criminal during his or her trial on the issue of guilt.[2] Nevertheless, due process requires that the defendant be given reasonable notice that a sentence under an habitual offender, recidivist, or repeat or successive offender statute may be imposed,[3] as well as an opportunity to be heard regarding the possibility of an enhanced sentence.[4]

Due process does not necessarily require that notice of enhanced punishment for recidivism be given prior to trial on the substantive offense so long as the notice is received within a reasonable time prior to sentencing.[5] Thus, where a state treats the issue of guilt and sentencing in two separate proceedings, due process does not require that a defendant be given such notice before a trial on the substantive offense as long as it is given before sentencing.[6] In any event, such notice can be waived,

consistently with due process, where the accused is present with counsel and is given an opportunity to be heard and contest the previous convictions or seek a continuance but fails to do so.[7]

Where the prosecution seeks to have a defendant's sentence enhanced under an habitual criminal, recidivist, or repeat or successive offender statute, due process also requires that the defendant be given an opportunity to be heard on the issue of the prior conviction.[8] That is, due process requires that a person charged with being an habitual offender be afforded the right to challenge the constitutional validity of prior convictions upon the basis of which the State seeks to impose an enhanced penalty.[9] However, the Due Process Clause of the Federal Constitution does not require that recidivism be pleaded and proved to a jury beyond a reasonable doubt.[10] Thus, the fact of the predicate felonies supporting a recidivist enhancement need not be proven to a jury beyond a reasonable doubt; there is no federal constitutional requirement to do so under the Due Process Clause of the Fourteenth Amendment or the pursuant to the Sixth Amendment right to a trial by jury.[11]

Due process is not denied by the filing of an habitual offender charge because it compels the defendant, in the phase of a trial concerned with determining guilt, to choose between testifying in his or her own behalf and thereby becoming subject to cross-examination that could expose him or her as an habitual offender, and influence the jury in its deliberation on the habitual offender count, and not testifying.[12]

No due process violation results from using nonfinal convictions to enhance a sentence since a successful appeal does not create a probability that jury verdicts are unreliable or prevent nonfinal convictions from satisfying the substantial factual basis standard.[13]

CUMULATIVE SUPPLEMENT

Cases:

Use of defendant's tribal-court convictions as predicate offenses for the crime of domestic assault in Indian country by an habitual offender did not violate due process, where the tribal court proceedings complied with the Indian Civil Rights Act (ICRA). U.S.C.A. Const.Amend. 5; Indian Civil Rights Act of 1968, § 202(a)(8), 25 U.S.C.A. § 1302(a)(8). U.S. v. Bryant, 136 S. Ct. 1954 (2016).

Defendant's mandatory life sentence for attempting to possess 50 grams or more of methamphetamine with intent to distribute, pursuant to recidivist sentencing scheme, was severe but was not a violation of due process. U.S. Const. Amend. 5; Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. §§ 841(a)(1), 841(b)(1)(A)(viii). United States v. Lopez, 907 F.3d 537 (7th Cir. 2018).

[END OF SUPPLEMENT]

Footnotes

1 W. Va.—State v. Vance, 164 W. Va. 216, 262 S.E.2d 423 (1980).
A.L.R. Library
Imposition of enhanced sentence under recidivist statute as cruel and unusual punishment, 27 A.L.R. Fed. 110.

2 Fla.—Eutsey v. State, 383 So. 2d 219 (Fla. 1980).
No constitutional right to trial on fact of prior conviction
Conn.—State v. Myers, 290 Conn. 278, 963 A.2d 11 (2009).

Lack of assistance of counsel

Even if a defendant who received an enhanced sentence as a result of juvenile convictions did not receive assistance of counsel in one prior misdemeanor conviction used for enhancement purposes, no denial of fundamental fairness resulted since the defendant would have received exactly the same sentence in absence of the misdemeanor conviction; thus, no due process violation occurred.

U.S.—McCullough v. Singletary, 967 F.2d 530 (11th Cir. 1992).

3 U.S.—Specht v. Patterson, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967).

Tex.—McNatt v. State, 188 S.W.3d 198 (Tex. Crim. App. 2006).

Wyo.—Heinemann v. State, 12 P.3d 692 (Wyo. 2000).

Oral notice

Although written notice is preferable, oral notice that the prosecution intends to ask the court to invoke the habitual criminal act, together with a hearing thereon, without objection by the defendant, satisfies the requirements of due process.

Kan.—State v. Voiles, 226 Kan. 469, 601 P.2d 1121 (1979).

4 Wyo.—Heinemann v. State, 12 P.3d 692 (Wyo. 2000).

5 Md.—Lee v. State, 332 Md. 654, 632 A.2d 1183 (1993).

As to due process considerations with respect to enhanced or extended sentences, generally, see § 1751.

Sentencing as armed career criminal

Due process requires that a defendant receive reasonable notice and opportunity to be heard regarding sentence increase for recidivism but does not require formal notice before trial; thus, there was no due process requirement that a defendant receive formal notice prior to trial that he could be sentenced as an armed career criminal.

U.S.—U.S. v. Hardy, 52 F.3d 147 (7th Cir. 1995).

6 U.S.—Oyler v. Boles, 368 U.S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962).

Ala.—Waites v. State, 409 So. 2d 1005 (Ala. Crim. App. 1982).

N.M.—State v. Stout, 1981-NMSC-045, 96 N.M. 29, 627 P.2d 871 (1981).

7 U.S.—Oyler v. Boles, 368 U.S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962).

Ala.—Thompson v. State, 405 So. 2d 717 (Ala. Crim. App. 1981), writ denied, 405 So. 2d 721 (Ala. 1981).

8 U.S.—Specht v. Patterson, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967).

Haw.—State v. Freitas, 61 Haw. 262, 602 P.2d 914 (1979).

Kan.—State v. Voiles, 226 Kan. 469, 601 P.2d 1121 (1979).

N.C.—State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318 (1979).

Counsel's stipulation

A defendant's due process rights were violated when defense counsel stipulated, without the defendant's consent, that the defendant had four prior convictions and the defendant was deprived of the opportunity afforded him by an habitual criminal statute to make a challenge before a jury to the use of prior convictions in sentencing.

U.S.—Cox v. Hutto, 619 F.2d 731 (8th Cir. 1980).

9 Ind.—Haynes v. State, 436 N.E.2d 874 (Ind. Ct. App. 1982).

Enhancement based on nonjury juvenile convictions

Enhancement of a defendant's adult sentence based on his prior, nonjury juvenile convictions, did not deny the defendant fundamental fairness and, thus, did not violate his due process rights.

U.S.—McCullough v. Singletary, 967 F.2d 530 (11th Cir. 1992).

10 Wash.—State v. Wheeler, 145 Wash. 2d 116, 34 P.3d 799 (2001).

11 W. Va.—State ex rel. Appleby v. Recht, 213 W. Va. 503, 583 S.E.2d 800 (2002).

12 Ind.—Reed v. State, 438 N.E.2d 704 (Ind. 1982).

13 U.S.—Clawson v. U.S., 52 F.3d 806 (9th Cir. 1995).

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

2. Requisites and Sufficiency of Sentencing Procedure

§ 1753. Probation or suspension of sentence

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4731, 4733 to 4735

In general, the same procedural safeguards are not required at probation hearings as in the case of a trial on the issue of guilt, but an applicant for probation is entitled to relief on due process grounds if the hearing procedures are fundamentally unfair.

In general, the same procedural safeguards are not required at probation hearings as in the case of a trial on the issue of guilt, but an applicant for probation is entitled to relief on due process grounds if the hearing procedures are fundamentally unfair.[1] Likewise, one under a conditional suspended sentence order has a very limited liberty interest, but such a person is entitled to minimal due process rights.[2]

In determining whether to grant probation, a court may, without violating due process, consider material in an unsworn[3] presentence report.[4] Where probation is denied contrary to a recommendation in a probation report, a statement of the reasons for the denial is desirable but not required by due process.[5]

Eligibility for probation or suspended sentence.

Due process is not denied by statutes which preclude the granting of probation for certain offenses, such as a forcible felony involving the use of a firearm,[6] or unlawful delivery of drugs.[7] Similarly, due process is not denied by statutes which preclude the imposition of a suspended sentence for particular persons or offenses, such as persons convicted of murder and other serious crimes.[8]

Extension of probation.

Due process does not require notice and/or a hearing prior to an order extending a term of probation.[9]

CUMULATIVE SUPPLEMENT

Cases:

Sentencing order prohibiting defendant from having any contact "in any manner whatsoever" with victim or her immediate family, including contact through third parties, did not give defendant fair warning that filing petition to establish parenting plan for his and victim's child constituted "contact" such that his suspended sentences could be imposed, and thus trial court violated defendant's due process rights as guaranteed by state constitution when it imposed portion of his suspended sentences based on defendant's act of filing petition, where no-contact provision did not reference defendant's right of access to courts or his fundamental liberty interest in parenting his child. N.H. Const. pt. I, art. 15; N.H. Rev. Stat. Ann. § 173-B:5-a. State v. Long, 146 A.3d 619 (N.H. 2016).

[END OF SUPPLEMENT]

Footnotes

1 Cal.—People v. Peterson, 9 Cal. 3d 717, 108 Cal. Rptr. 835, 511 P.2d 1187 (1973).

2 Wash.—State v. Nelson, 103 Wash. 2d 760, 697 P.2d 579 (1985).
Option to testify at hearing required
N.H.—State v. Flood, 159 N.H. 353, 986 A.2d 626 (2009).
No entitlement to assistance of counsel
An indigent defendant was not entitled to assistance of counsel, under the due process clause, in sentence suspension proceedings.
N.H.—State v. Gibbons, 135 N.H. 320, 605 A.2d 214 (1992).

3 Wash.—State v. Derefield, 5 Wash. App. 798, 491 P.2d 694 (Div. 2 1971).

4 U.S.—U.S. v. Chewning, 458 F.2d 381 (9th Cir. 1972).
Idaho—State v. Moore, 93 Idaho 14, 454 P.2d 51 (1969).
As to the requirement that a presentence report relied upon in sentencing be disclosed to the defendant, see § 1747.

5 Cal.—People v. Edwards, 18 Cal. 3d 796, 135 Cal. Rptr. 411, 557 P.2d 995 (1976).

6 Iowa—State v. Holmes, 276 N.W.2d 823 (Iowa 1979).

7 Okla.—Draughn v. State, 1975 OK CR 163, 539 P.2d 1389 (Okla. Crim. App. 1975).

8 Ind.—Downs v. State, 267 Ind. 342, 369 N.E.2d 1079 (1977).
Drug sale cases
Okla.—Davis v. State, 1974 OK CR 78, 521 P.2d 422 (Okla. Crim. App. 1974).

9 U.S.—U.S. v. Cornwell, 625 F.2d 686 (5th Cir. 1980); Forgues v. U.S., 636 F.2d 1125 (6th Cir. 1980).

Ohio—State v. Jones, 60 Ohio App. 2d 178, 14 Ohio Op. 3d 140, 396 N.E.2d 244 (1st Dist. Hamilton County 1978).

Wash.—State v. Campbell, 95 Wash. 2d 954, 632 P.2d 517 (1981).

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

2. Requisites and Sufficiency of Sentencing Procedure

§ 1754. Probation or suspension of sentence—Terms and conditions

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4732

In general, in order to comport with the requirements of due process, a condition of probation must be sufficiently precise and unambiguous to inform the probationer of the conduct that is essential so that he or she may retain his or her liberty.

Due process requires that the trial court and the probation order adequately place the probationer on notice of conduct that is both required and prohibited during the probationary period,[1] and a condition of probation must be sufficiently precise and unambiguous to inform the probationer of the conduct that is essential to the retention of his or her liberty.[2] When the deprivation of the defendant's conditional liberty, resulting from a suspended sentence, rests upon the commission of a noncriminal act, the defendant must be given some form of warning to ensure that he or she understands, in plain and certain terms, the conditions of his or her sentence, and due process mandates that he or she be given actual notice that such conduct could result in the revocation of his or her conditional liberty.[3] However, probation conditions need not provide the fullest warning imaginable, and the notice requirement can be satisfied by an imprecise but comprehensible normative standard so that people of common intelligence will know its meaning.[4] Moreover, some terms of probation are implied by the imposition of probation itself and need not be explicitly stated to give fair warning to the probationer, such as that if the probationer commits a crime, he or she will lose the privilege of conditional liberty.[5] A judge's inquiry whether a defendant sentenced to probation has received the

fair notice required by due process is not confined to the four corners of the probation order; rather, the order's meaning may be illuminated by the judge's statements and other events that are part of the notification process.[6]

Due process mandates the presence of accused and the assistance of counsel when the terms and conditions of probation are established.[7]

Restitution as condition of probation.

In general, the imposition of restitution payments to the injured party as a condition of probation does not violate due process.[8] In any event, where restitution is to be ordered, due process is satisfied when the defendant is afforded a hearing on the amount of the restitution[9] and where there is a factual basis in the record to support the court's calculations as to the proper sum of restitution.[10]

On the other hand, a recoupment statute permitting the imposition of a condition of probation that the defendant reimburse the court for the costs of court-appointed counsel does not violate due process, even though it does not provide for any type of hearing,[11] since, before probation may be revoked, the defendant must be given a hearing at which the prosecution would have to prove that the defendant is capable of, but unwilling to, repay the costs of court-appointed counsel.[12]

Modification of terms of probation.

Modification of the terms of probation without a hearing does not violate due process where the terms imposed could have been included in the original conditions, the terms are not unreasonable, the defendant is given notice of the changes, and the changes are authorized by statute.[13] On the other hand, due process is violated when the conditions of probation are modified in the absence of probationer's counsel or in the absence of both probationer and counsel.[14]

CUMULATIVE SUPPLEMENT

Cases:

Probation condition prohibiting probationer from owning or possessing any "weapon" that could be concealed on his person was not unconstitutionally vague under due process clause, since the condition plainly prohibited the possession of items specifically designed as weapons, as well as other items that probationer might intend to use to inflict great bodily injury. U.S. Const. Amend. 14; Cal. Const. art. 1, §§ 7, 15. People v. Gaines, 242 Cal. App. 4th 1035, 195 Cal. Rptr. 3d 842 (1st Dist. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Fla.—Lawson v. State, 969 So. 2d 222 (Fla. 2007).
Special condition not statutorily authorized
With regard to a special condition of probation that is not statutorily authorized, the law requires that it be pronounced orally at sentencing before it can be included in a probation order, and consequently, when the trial court sufficiently apprises the defendant of the substance of each special condition so that the defendant

has an opportunity to object to any condition which the defendant believes is inappropriate, the minimum requirements of due process are satisfied.

Fla.—State v. Hart, 668 So. 2d 589 (Fla. 1996).

2 Alaska—Rich v. State, 640 P.2d 159 (Alaska Ct. App. 1982).

Fair warning an essential component of due process

U.S.—U.S. v. Dane, 570 F.2d 840 (9th Cir. 1977).

Condition unconstitutionally vague

A probation condition requiring defendant to stay 300 yards from a playground was unconstitutionally vague in violation of due process absent an express knowledge requirement; the court would modify the condition to prohibit knowingly coming within 300 yards of a playground.

Cal.—People v. Povio, 174 Cal. Rptr. 3d 529 (Cal. App. 6th Dist. 2014), review filed, (Aug. 20, 2014).

Condition not unconstitutionally vague

A condition of a defendant's probation that he conduct himself in a law-abiding manner was not so unconstitutionally vague that the defendant was denied due process.

Cal.—People v. Jones, 263 Cal. App. 2d 818, 70 Cal. Rptr. 13 (1st Dist. 1968).

Contradictory orders or instructions

Probation could not be revoked because a probationer refused to follow the instructions of a restitution center's employee, who directed the probationer to turn his paycheck in to the center, where the probationing court had mandated that the probationer pay support to his dependents; the contradictory orders violated the probationer's due process rights where the violation of either would result in the revocation of probation.

Tex.—DeGay v. State, 741 S.W.2d 445 (Tex. Crim. App. 1987).

As to due process in connection with revocation of probation, generally, see § 1785.

3 N.H.—State v. Kay, 162 N.H. 237, 27 A.3d 749 (2011).

Notice required at time of sentencing

For due process reasons and because a defendant must make a contemporaneous objection to probation conditions at the time of sentencing, a defendant must be adequately placed on notice of conditions being imposed at the time of sentencing.

Fla.—State v. Hart, 668 So. 2d 589 (Fla. 1996).

Imprisonment after refusal to accept condition

A sentence of imprisonment imposed after the defendant refused to accept as a condition of probation that he not participate in particular unlawful activities was not punishment for future criminal conduct and, thus, did not violate the defendant's due process rights.

Mass.—Com. v. Cotter, 415 Mass. 183, 612 N.E.2d 1145 (1993).

4 Mass.—Com. v. Kendrick, 446 Mass. 72, 841 N.E.2d 1235 (2006).

5 N.H.—State v. Kay, 162 N.H. 237, 27 A.3d 749 (2011).

Violation as basis of revocation

Formal conditions of probation serve the purpose of giving notice of proscribed activities, but a formal condition is not essential for purposes of notice of a violation as the basis for revocation of probation.

S.D.—Brant v. South Dakota Bd. of Pardons and Paroles, 2012 SD 12, 809 N.W.2d 847 (S.D. 2012).

Failure to give notice of good behavior as condition

The failure to give notice to the defendant that good behavior was a condition of his deferred sentence did not violate due process.

N.H.—State v. Graham, 146 N.H. 142, 769 A.2d 355 (2001).

6 Mass.—Com. v. Ruiz, 453 Mass. 474, 903 N.E.2d 201 (2009).

7 W. Va.—Louk v. Haynes, 159 W. Va. 482, 223 S.E.2d 780 (1976).

8 Mich.—People v. Williams, 57 Mich. App. 439, 225 N.W.2d 798 (1975).

No denial of due process shown

A defendant was not denied due process by the imposition of a five-year initial term of probation due to the defendant's financial situation and current inability to pay restitution even though the presentence investigation report recommended three years of probation; the effect on the defendant's liberty interest was not extensive, there was a rational connection in ensuring that the victim would receive its restitution payment and extending the defendant's probation, and the procurement of a civil judgment against the defendant furnished a poor substitute for monitoring the defendant's progress in payment under probation.

U.S.—U.S. v. Johnson, 347 F.3d 412 (2d Cir. 2003).

9 Ga.—Cannon v. State, 246 Ga. 754, 272 S.E.2d 709 (1980).
N.J.—State v. Harris, 70 N.J. 586, 362 A.2d 32 (1976).
N.M.—State v. Lack, 98 N.M. 500, 1982-NMCA-111, 650 P.2d 22 (Ct. App. 1982).
Determination by probation officer
Where the amount of restitution determined by a probation officer to be owed by a criminal defendant to a victim had never been presented to, or approved by, the sentencing judge; the defendant was refused the opportunity to challenge the accuracy of the amount claimed; and the penalty for failure to pay restitution out of his weekly salary was revocation of probation and imprisonment, the defendant was denied due process.
U.S.—Morgan v. Wofford, 472 F.2d 822 (5th Cir. 1973).

10 N.J.—State v. Harris, 70 N.J. 586, 362 A.2d 32 (1976).
N.M.—State v. Lack, 98 N.M. 500, 1982-NMCA-111, 650 P.2d 22 (Ct. App. 1982).

11 N.D.—State v. Kottenbroch, 319 N.W.2d 465 (N.D. 1982).
Prior information
The fact that the defendant, whose probation was conditioned on his repayment of his court-appointed counsel's fees, had not been informed, before accepting such counsel, that such condition of probation could be imposed did not deny the defendant due process.
S.D.—White Eagle v. State, 280 N.W.2d 659 (S.D. 1979).

12 N.D.—State v. Kottenbroch, 319 N.W.2d 465 (N.D. 1982).

13 Tex.—Sanchez v. State, 603 S.W.2d 869 (Tex. Crim. App. 1980).
Change in policy
Because a policy that curtailed the right of sex offender probationers to travel interstate did not deprive a probationer of any liberty interests, he was not entitled to any procedural due process safeguards with respect to the change in policy.
U.S.—Pelland v. Rhode Island, 317 F. Supp. 2d 86 (D.R.I. 2004).

14 W. Va.—Louk v. Haynes, 159 W. Va. 482, 223 S.E.2d 780 (1976).

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Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

3. Execution of Sentence; Prisons and Prisoners

a. In General

§ 1755. Execution of sentence, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3840, 4740

It is for the states, by their courts or otherwise, to determine the interpretation of their statutes and processes and the question of whether, under their own procedure, execution of sentence may be had.

The sentencing process must satisfy the requirements of due process,[1] and a defendant sentenced to inarceration has a due process right to serve the sentence promptly and continuously rather than in installments.[2] However, a defendant who has received state and federal sentences has no due process or other constitutional right to serve the sentences in any particular order.[3]

It is for the states, by their courts or otherwise, to determine the interpretation of their statutes and processes and the question of whether, under their own procedure, execution of sentence may be had.[4] On the other hand, an assertion by a state of a right to custody of a person whom it has misled to believe that the person is free of a prison sentence, and against whom no attempt is made for a prolonged number of years to reacquire custody, offends due process.[5]

The right to postconviction confinement credit upon a sentence constitutes a liberty interest sheltered by the Due Process Clause of the Fourteenth Amendment.[6]

Prison regulations.

A prison regulation which is not reasonably related to a valid governmental interest contravenes the Due Process Clause[7] as does the failure of prison authorities to follow their own rules and regulations.[8]

Recomputation of sentence; expiration of sentence.

An inmate is entitled to some form of due process hearing prior to an administrative recomputation of the inmate's sentence.[9] A state prisoner clearly has a Fourteenth Amendment right to be released from service of a sentence on expiration of its unequivocal term,[10] and a person held in confinement after the person's sentence has expired is imprisoned without due process of law.[11]

Sentence of foreign court.

The Fifth Amendment permits the United States to enforce sentences meted out by foreign courts even if those sentences were procured under procedures which do not comport with the Bill of Rights.[12]

CUMULATIVE SUPPLEMENT

Cases:

Private interest affected by official action weighed in favor of finding a violation of state prisoner's procedural due process rights, with respect to officials from New York Department of Corrections and Community Supervision (DOCCS) failing to provide notice to state sentencing court and to attorneys who had been present at prisoner's state sentencing, before officials implemented prisoner's state sentence, following completion of his federal sentence, in a manner that diverged from sentence pronounced by state court, i.e., state court had directed that federal and state sentences would be concurrent, but the directive was not authorized under New York law because federal sentence had not been imposed at time of state sentencing, and officials decided to implement a consecutive state sentence; prisoner's interest in being free from physical detention by the government was the most elemental of liberty interests. U.S. Const. Amend. 14; N.Y. Penal Law §§ 70.30(1, 2-a). Francis v. Fiacco, 942 F.3d 126 (2d Cir. 2019).

[END OF SUPPLEMENT]

Footnotes

1 § 1744.

2 Mass.—Com. v. Ly, 450 Mass. 16, 875 N.E.2d 840 (2007).

3 Fla.—Buss v. Reichman, 53 So. 3d 339 (Fla. 4th DCA 2011).

4 U.S.—Hebert v. State of La., 272 U.S. 312, 47 S. Ct. 103, 71 L. Ed. 270, 48 A.L.R. 1102 (1926); U. S. ex rel. Marelia v. Burke, 101 F. Supp. 615 (E.D. Pa. 1951), judgment aff'd, 197 F.2d 856 (3d Cir. 1952).
Ga.—Dixon v. State, 83 Ga. App. 227, 63 S.E.2d 278 (1951).
Execution of sentence imposed in absentia

A defendant was not denied his right to counsel or due process when he was brought before a judge for execution of a sentence imposed in absentia, without being afforded counsel or an opportunity to explain his absence at sentencing, since it was not a critical stage of the proceedings against him.

N.Y.—People v. Villegas, 146 A.D.2d 228, 540 N.Y.S.2d 777 (1st Dep't 1989).

5 U.S.—Lanier v. Williams, 361 F. Supp. 944 (E.D. N.C. 1973).

Due process rights violated

(1) Reincarceration of a defendant, after the department of corrections mistakenly released him early with knowledge of his pending theft charge, violated the defendant's due process rights, where the warden neither alleged nor proved that the defendant violated the terms of his probation while he was at liberty, and the State made no attempt to reacquire custody over the defendant for a period of seven years until after expiration of the incarceration period of the sentence.

Ga.—Derrer v. Anthony, 265 Ga. 892, 463 S.E.2d 690 (1995).

(2) Where, after the court dismissed the petitioner's appeal from a second-degree burglary conviction, five years elapsed before a bench warrant was issued for the petitioner's arrest to serve a three-year sentence that had been imposed, and the delay was due to no fault of the petitioner and, after his conviction, the petitioner had testified as a state's witness in a murder trial pursuant to an agreement with the then district attorney that in exchange for the petitioner's testimony the district attorney would confess to the petitioner's motion for a new trial and not prosecute a retrial, the petitioner was justified in believing that the matter had been laid to rest, and execution of the sentence would violate fundamental fairness and due process.

Okla.—Bonner v. Brock, 1980 OK CR 27, 610 P.2d 265 (Okla. Crim. App. 1980).

No violation of due process shown

A more than 20-year delay in the execution of a death sentence against a defendant who was convicted of capital murder of a police officer was not cruel or unusual, and did not deprive the defendant of the right to due process, where the delay was occasioned not only by the normal postconviction review process but also by the defendant's obtaining a new trial when an appellate court granted habeas relief.

Cal.—People v. Brown, 33 Cal. 4th 382, 15 Cal. Rptr. 3d 624, 93 P.3d 244 (2004).

6 U.S.—Durkin v. Davis, 390 F. Supp. 249 (E.D. Va. 1975).

Penalty for collateral attack

Denying a prisoner credit for time already served in order to penalize the prisoner for exercising the right to make a collateral attack upon an unconstitutional conviction abridges due process.

U.S.—Gainey v. Turner, 266 F. Supp. 95 (E.D. N.C. 1967).

Conditional liberty interest in gain time

An inmate's placement on conditional release did not violate due process on the ground that it improperly took away his liberty interest in the gain time he had been awarded, as the inmate only had a conditional liberty interest in gain time, and if the inmate lost gain time, it would only be after due process of law was accorded him.

Fla.—Duncan v. Moore, 754 So. 2d 708 (Fla. 2000).

As to a prisoner's interest in retaining a state-created right to good-time credit as protected by the Due Process Clause, generally, see § 1773.

7 U.S.—James v. Wallace, 382 F. Supp. 1177 (M.D. Ala. 1974).

8 U.S.—Giampetruzzi v. Malcolm, 406 F. Supp. 836 (S.D. N.Y. 1975).

N.Y.—Jones v. Coughlin, 112 Misc. 2d 232, 446 N.Y.S.2d 849 (Sup 1982).

Noncompliance not shown

Prison authorities, who advised each visitor whose visit to a prison inmate resulted in the termination of visitation privileges of that "action," did not fail to comply with their own regulations by failing to inform all visitors on the visiting list of a restriction or termination of visiting privileges and the reasons therefor, and thus, there was no denial of due process.

U.S.—White v. Keller, 438 F. Supp. 110 (D. Md. 1977), judgment aff'd, 588 F.2d 913 (4th Cir. 1978).

As to due process with respect to prisoner's visitation rights, generally, see § 1763.

9 Pa.—Carter v. Com., Dept. of Justice, and Bureau of Corrections, 43 Pa. Commw. 416, 402 A.2d 711 (1979).

10 U.S.—Perkins v. Peyton, 369 F.2d 590 (4th Cir. 1966).

11 U.S.—Douthit v. Jones, 619 F.2d 527 (5th Cir. 1980).

Ill.—People ex rel. Michaels v. Bowen, 367 Ill. 589, 12 N.E.2d 625 (1937).

12 U.S.—Pfeifer v. U.S. Bureau of Prisons, 468 F. Supp. 920 (S.D. Cal. 1979), judgment aff'd, 615 F.2d 873 (9th Cir. 1980).

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16C C.J.S. Constitutional Law § 1756

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Constitutional Law
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3. Execution of Sentence; Prisons and Prisoners

a. In General

§ 1756. Rights or interests of prisoners in general

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4820, 4821

A valid conviction and sentence extinguishes the defendant's right to liberty otherwise protected by the constitutional guarantee of due process, but subject to the legitimate requirements of prison discipline and security, a prison inmate retains the constitutional right to due process.

In general, a valid conviction and sentence extinguishes the defendant's right to liberty otherwise protected by the due process guaranty for the length of the sentence imposed.[1] When the State has not given back a liberty interest, no due process is necessary to continue the denial of the liberty interest.[2] However, if the State chooses to give a prisoner back some of the prisoner's liberty, or a right to liberty, by granting the prisoner parole, probation, good-time credits, or an expectation of parole, the State must once again provide the prisoner with due process before removing the liberty.[3]

In the prison context, due process safeguards only a narrow range of protected liberty interests,[4] and certainly, prisoners have fewer liberty interests than ordinary citizens.[5] Prisoners typically have a protected liberty interest only in freedom from restraint

that imposes atypical and significant hardship in relation to the ordinary incidents of prison life.[6] In any event, subject to the legitimate requirements of prison discipline and security, a prison inmate retains the constitutional right to due process,[7] and federal courts may hear due process claims raised by citizens held prisoner within the territorial jurisdiction of the United States.[8]

Prisoners possess rights under,[9] and retain the protections of,[10] the Due Process Clause. In general, the due process protection of liberty interests held by prisoners safeguards them from arbitrary government action,[11] and state officials have a duty mandated by the Fourteenth Amendment to insure that inmates incarcerated under the laws of the state are not deprived of their constitutional rights.[12] However, not every governmental action carrying adverse consequences for prison inmates automatically activates a due process right.[13] To establish a due process violation, an inmate must show that a government official made a deliberate decision to deprive the inmate of life, liberty, or property.[14] In considering whether a prisoner is being denied due process rights, the courts must seek to determine what is reasonable under the circumstances at hand.[15] As a general rule, if the challenged act is one exercised in good faith, is committed solely to the discretion of prison officials and does not implicate a fundamental constitutional guarantee, it is generally not within the reach of the procedural protection of the Due Process Clause.[16]

An inmate who is mistakenly released from prison ordinarily does not have a cognizable liberty interest in remaining free.[17]

Expungement of prison records.

An inmate has a limited right, grounded in the Due Process Clause, to have erroneous information expunged from the inmate's prison file.[18] A claim of constitutional magnitude is raised where a state prison inmate alleges that certain information is in the inmate's prison file, that the information is false, and that it is relied on to a constitutionally significant degree.[19]

Right to marry.

The fundamental right to marry remains constitutionally protected in the penological context.[20]

Footnotes

1 U.S.—U.S. v. Chagra, 669 F.2d 241, 9 Fed. R. Evid. Serv. 1567 (5th Cir. 1982).

2 Idaho—State v. Coassolo, 136 Idaho 138, 30 P.3d 293 (2001).

3 Idaho—State v. Coassolo, 136 Idaho 138, 30 P.3d 293 (2001).
As to a prisoner's interest in retaining a state-created right to good-time credit as protected by the Due Process Clause, generally, see § 1773.

4 U.S.—Rezaq v. Nalley, 677 F.3d 1001 (10th Cir. 2012); Allen v. Clements, 930 F. Supp. 2d 1252 (D. Colo. 2013).

5 U.S.—Straley v. Utah Bd. of Pardons, 582 F.3d 1208 (10th Cir. 2009); Catanzaro v. Harry, 848 F. Supp. 2d 780 (W.D. Mich. 2012).

6 U.S.—Vega v. Lantz, 596 F.3d 77 (2d Cir. 2010); Iwanicki v. Pennsylvania Dept. of Corrections, 582 Fed. Appx. 75 (3d Cir. 2014).
Conn.—Vandever v. Commissioner of Correction, 315 Conn. 231, 106 A.3d 266 (2014).
Baseline for determination
The baseline for determining what is "atypical and significant," and "the ordinary incidents of prison life," is ascertained by what a sentenced inmate may reasonably expect to encounter as a result of a conviction in accordance with due process of law.

U.S.—Powell v. Weiss, 757 F.3d 338 (3d Cir. 2014).

Forcible medication

The court would not authorize the Bureau of Prisons to forcibly medicate a defendant who was in custody for a psychiatric/psychological evaluation, even though he clearly had a mental condition rendering him "gravely disabled," since the Bureau's decision to forcibly medicate the defendant had not been taken through administrative due process procedures, the defendant was not in the custody of the Bureau for purposes of treatment, and the defendant was not facing serious criminal charges upon which he would be tried.

U.S.—U.S. v. Kourey, 276 F. Supp. 2d 580 (S.D. W. Va. 2003).

As to due process with respect to the administration of unwanted medication, see § 1768.

7 U.S.—Sweet v. South Carolina Dept. of Corrections, 529 F.2d 854 (4th Cir. 1975).

Conn.—Roque v. Warden, Connecticut Correctional Inst., Somers, 181 Conn. 85, 434 A.2d 348 (1980).

Private meetings with religious advisers

Protective custody inmates, who were not permitted "truly private meetings" with religious advisors, were not afforded a reasonable opportunity to exercise their religious freedom as guaranteed by the First and Fourteenth Amendments of the United States Constitution.

U.S.—Griffin v. Coughlin, 743 F. Supp. 1006 (N.D. N.Y. 1990).

8 U.S.—Rosado v. Civiletti, 621 F.2d 1179 (2d Cir. 1980).

9 U.S.—Hutchings v. Corum, 501 F. Supp. 1276 (W.D. Mo. 1980).

N.J.—State v. Holmes, 109 N.J. Super. 180, 262 A.2d 725 (Law Div. 1970).

10 U.S.—Hudson v. Palmer, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984); Hernandez v. Cox, 989 F. Supp. 2d 1062 (D. Nev. 2013).

Cal.—In re Morales, 212 Cal. App. 4th 1410, 152 Cal. Rptr. 3d 123 (1st Dist. 2013).

Minn.—Hines v. Fabian, 764 N.W.2d 849 (Minn. Ct. App. 2009).

11 U.S.—Ward v. Ryan, 623 F.3d 807 (9th Cir. 2010).

Ky.—Hill v. Thompson, 297 S.W.3d 892 (Ky. Ct. App. 2009).

12 U.S.—McMurry v. Phelps, 533 F. Supp. 742 (W.D. La. 1982) (overruled on other grounds by, Thorne v. Jones, 765 F.2d 1270 (5th Cir. 1985)).

13 U.S.—Kincaid v. Duckworth, 689 F.2d 702 (7th Cir. 1982); Garza v. Miller, 688 F.2d 480 (7th Cir. 1982).

S.D.—Bush v. Canary, 286 N.W.2d 536 (S.D. 1979).

14 U.S.—Torres v. Amato, 22 F. Supp. 3d 166 (N.D. N.Y. 2014).

15 U.S.—Rutherford v. Pitchess, 457 F. Supp. 104 (C.D. Cal. 1978).

16 U.S.—Dawson v. Kendrick, 527 F. Supp. 1252 (S.D. W. Va. 1981).

17 U.S.—Campbell v. Williamson, 783 F. Supp. 1161 (C.D. Ill. 1992).

18 U.S.—Paine v. Baker, 595 F.2d 197 (4th Cir. 1979).

19 U.S.—Bukhari v. Hutto, 487 F. Supp. 1162 (E.D. Va. 1980).

Nature of false information

If an alleged error in a state prison inmate's prison file is a technical one which would not reasonably be a factor relied on in the decisionmaking process, no claim for relief under the Due Process Clause will lie, but if the error is more significant, as by involving the inmate's past criminal record or record of disciplinary offenses while in prison, fundamental fairness requires its expunction for the reason that it may reasonably be relied on.

U.S.—Paine v. Baker, 595 F.2d 197 (4th Cir. 1979).

20 N.Y.—Boehm v. Evans, 79 A.D.3d 1445, 914 N.Y.S.2d 318 (3d Dep't 2010).

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16C C.J.S. Constitutional Law § 1757

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J. Judgment, Sentence, and Punishment; Appeal and Error

3. Execution of Sentence; Prisons and Prisoners

a. In General

§ 1757. Sources and nature of prisoner's due process rights or interests

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4820, 4821

Due process interests enforceable by a prisoner may originate in constitutional provisions or be created by statutes or regulations, policies, understandings, contractual arrangements, court interpretations, or institutional practices.

Due process interests enforceable by a prisoner may originate in constitutional provisions or be created by statutes or regulations,[1] policies, understandings, contractual arrangements, court interpretations, or institutional practices.[2] A liberty interest protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution thus may arise from the constitution itself, by reason of the guarantees implicit in the word "liberty," or it may arise from an expectation or interest created by state laws or policies.[3] Regardless of its source, the interest to be protected must be a property or liberty interest,[4] and a prisoner is not constitutionally entitled to due process protections unless the prisoner establishes a constitutional right or some justifiable expectation rooted in state law that the challenged action will not be taken absent the occurrence of a specified factual predicate.[5]

A due process interest can be created by the terms or conditions of a sentence.[6] Due process may be violated, for example, when a defendant's sentence is enhanced after the defendant has developed a crystallized expectation of finality in the earlier sentence.[7]

The loss of privileges alone does not entitle a prisoner to due process safeguards.[8] Unless the government has treated a prison benefit as one defeasible only on the occurrence of specified events, withdrawal of the benefit falls outside constitutional protection, and where withdrawal of the benefit is within the discretion of the authorities, no protected liberty interest in the benefit arises.[9] On the other hand, even if a prisoner has no constitutional right to certain privileges, once such privileges are given, the prisoner may have an interest in them which is protected by due process.[10]

Generally, to demonstrate a constitutionally protected interest in a particular benefit, a prisoner must show that the prisoner is entitled to receive, or has a legitimate expectation of receiving, that benefit.[11] Thus, an entitlement to or an expectation of a constitutionally protected interest may be found in the language of the statute or regulations governing the benefit where the benefit is granted automatically, absent misbehavior; where the standards are sufficiently objective that the prisoner can place him- or herself within them; or where there is a consistent pattern or practice of granting the benefit to a vast majority of similarly situated applicants.[12]

Footnotes

1 U.S.—Pugliese v. Nelson, 617 F.2d 916 (2d Cir. 1980); Garza v. Miller, 688 F.2d 480 (7th Cir. 1982).
Okla.—Prock v. District Court of Pittsburg County, 1981 OK 41, 630 P.2d 772 (Okla. 1981).
Unmistakable language
A state-created liberty interest protected by the Due Process Clause arises when state statutes or regulations require, in language of an unmistakably mandatory character, that a prisoner not suffer a particular deprivation absent specified predicates.
U.S.—Vega v. Lantz, 596 F.3d 77 (2d Cir. 2010).

2 U.S.—Pugliese v. Nelson, 617 F.2d 916 (2d Cir. 1980); Dawson v. Kendrick, 527 F. Supp. 1252 (S.D. W. Va. 1981).

3 U.S.—Wilkinson v. Austin, 545 U.S. 209, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005).

4 U.S.—Saunders v. Packel, 436 F. Supp. 618 (E.D. Pa. 1977).
Ariz.—Brown v. State, 117 Ariz. 476, 573 P.2d 876 (1978).
Haw.—Lono v. Ariyoshi, 63 Haw. 138, 621 P.2d 976 (1981).
Access to e-mail
A federal inmate lacked a property or liberty interest implicated by the warden's refusal to give him access to e-mail, and thus, the warden's decision to exclude the inmate from using e-mail did not violate his due process rights.
U.S.—Solan v. Zickefoose, 530 Fed. Appx. 109 (3d Cir. 2013), cert. dismissed, 134 S. Ct. 1499, 188 L. Ed. 2d 373 (2014).
Quick and painless execution
A statute providing that a death sentence was to be executed by causing the application of a drug of sufficient dosage to quickly and painlessly cause death did not create a liberty and property interest in a quick and painless execution protected by due process.
U.S.—Cooey v. Strickland, 589 F.3d 210 (6th Cir. 2009).

5 U.S.—Christopher v. U.S. Bd. of Parole, 589 F.2d 924 (7th Cir. 1978); Bryant v. Carlson, 489 F. Supp. 1075 (M.D. Pa. 1979).
Hope or probability insufficient
A mere hope on the part of an inmate that some benefit will be granted is not sufficient to demonstrate the existence of a constitutionally protected interest nor is a mere statistical probability.
U.S.—Kozlowski v. Coughlin, 539 F. Supp. 852 (S.D. N.Y. 1982).

6 U.S.—Smith v. Stoner, 594 F. Supp. 1091 (N.D. Ind. 1984).

7 Minn.—State v. Calmes, 632 N.W.2d 641 (Minn. 2001).
As to due process rights with respect to enhanced or extended sentences, generally, see § 1743.

8 U.S.—Golden v. Coombe, 508 F. Supp. 156 (S.D. N.Y. 1981); Dawson v. Kendrick, 527 F. Supp. 1252 (S.D. W. Va. 1981).
La.—Watts v. Phelps, 377 So. 2d 1317 (La. Ct. App. 1st Cir. 1979), writ denied, 380 So. 2d 1210 (La. 1980).

9 D.C.—Smith v. Saxbe, 562 F.2d 729 (D.C. Cir. 1977).

10 U.S.—Durso v. Rowe, 579 F.2d 1365 (7th Cir. 1978); Mitchell v. Untreiner, 421 F. Supp. 886 (N.D. Fla. 1976).
Cal.—Wilson v. Superior Court, 21 Cal. 3d 816, 148 Cal. Rptr. 30, 582 P.2d 117 (1978).

11 U.S.—Finney v. Mabry, 528 F. Supp. 567 (E.D. Ark. 1981); Marciano v. Coughlin, 510 F. Supp. 1034 (E.D. N.Y. 1981).

12 U.S.—Marciano v. Coughlin, 510 F. Supp. 1034 (E.D. N.Y. 1981).

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16C C.J.S. Constitutional Law § 1758

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a. In General

§ 1758. Sources and nature of prisoner's due process rights or interests—Prison regulations

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4820

Prison regulations may grant prisoners liberty interests sufficient to invoke due process protections, at least where such regulations place substantive limitations on the discretion of prison officials.

In general, prison regulations place no substantive limitations on official discretion and thus create no liberty interest entitled to protection under the Due Process Clause,[1] and the constitutional guarantee of due process does not automatically incorporate all prison regulations into the United States Constitution.[2] Indeed, even those prison regulations which include mandatory language such as "shall" do not automatically confer on the prisoner an added procedural due process protection.[3]

Nonetheless, prison regulations may grant prisoners liberty interests sufficient to invoke due process protections.[4] Where rules and regulations place substantive limitations on the discretion of prison officials, they create a liberty interest[5] although only if such regulations shield inmates from an atypical or significant hardship in relation to the ordinary incidents of prison life.[6]

CUMULATIVE SUPPLEMENT

Cases:

Custodial personnel do not infringe an inmate's liberty interests under the due process clause by placing her in one custodial facility rather than another. U.S.C.A. Const.Amend. 14. Chavarriaga v. New Jersey Dept. of Corrections, 806 F.3d 210 (3d Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Olim v. Wakinekona, 461 U.S. 238, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983); Petrucelli v. Hasty, 605 F. Supp. 2d 410 (E.D. N.Y. 2009).
Regulations designed to guide correctional officers
Prison regulations primarily designed to guide correctional officials in the administration of a prison are not designed to confer liberty rights on inmates.
R.I.—DiCiantis v. Wall, 795 A.2d 1121 (R.I. 2002).

2 U.S.—Garza v. Miller, 688 F.2d 480 (7th Cir. 1982); Bryant v. Carlson, 489 F. Supp. 1075 (M.D. Pa. 1979).

3 Ky.—White v. Boards-Bey, 426 S.W.3d 569 (Ky. 2014).

4 U.S.—Garnica v. Washington Dept. of Corrections, 965 F. Supp. 2d 1250 (W.D. Wash. 2013).

5 U.S.—Hayes v. Lockhart, 754 F.2d 281 (8th Cir. 1985); Dedrick v. Wallman, 617 F. Supp. 178 (S.D. Iowa 1985).
Due process not denied
An attempted digital rectal search of a prison inmate suspected of carrying marijuana in his rectum was conducted in accordance with Federal Correctional Institution regulations and without excessive use of force, and thus, the inmate was not denied due process.
U.S.—U.S. v. Caldwell, 750 F.2d 341 (5th Cir. 1984).

6 U.S.—Sandin v. Conner, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995); Jones v. Cross, 637 F.3d 841 (7th Cir. 2011).

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16C C.J.S. Constitutional Law § 1759

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Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

3. Execution of Sentence; Prisons and Prisoners

a. In General

§ 1759. Sources and nature of prisoner's due process rights or interests—Property rights

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4822

In general, a prisoner retains the right not to be deprived of property without due process of law.

In general, a prisoner retains the right not to be deprived of property without due process of law.[1] Any significant deprivation of property by governmental action must be attended by notice and an opportunity to be heard.[2] However, the procedural protections of due process apply to inmates only if there is an existing liberty or property interest at stake.[3]

The failure to return a prisoner's confiscated property when requested to do so,[4] or the permanent forfeiture of a prisoner's property without statutory authority,[5] may violate the Due Process Clause of the Fourteenth Amendment even if the initial confiscation was justified and authorized.[6] Likewise, inmates have a property interest in money received from outside sources and, thus, are entitled to due process before they can be deprived of such money.[7]

However, not all deprivations of prisoners' property constitute a violation of due process.[8] Inmates claiming a violation under the Federal Due Process Clause must show that they have been deprived of some protected liberty or property interest by arbitrary government action.[9] Moreover, the deprivation of a prisoner's property does not violate due process where state law provides an adequate remedy for the deprivation.[10] Furthermore, reasonable restrictions upon the quantity and type of property an inmate may possess are not violative of due process.[11]

Employment.

An inmate does not have a property interest in employment while incarcerated,[12] but prison officials cannot discriminate against an inmate in the distribution of work assignments.[13]

Inmate accounts.

Prisoners have a property interest in their inmate trust accounts.[14] However, this interest is reduced because inmates are not entitled to complete control over their money while in prison.[15]

CUMULATIVE SUPPLEMENT

Cases:

Procedural due process principles were not implicated by inmate's averments in his complaint, challenging Department of Corrections' (DOC) policy prohibiting prisoners from possessing a particular style of boot; DOC's policy set forth rules of prospective effect that bound a broad class of individuals in state prisons, and it did not apply existing laws or regulations in manner that affected only one or several citizens. U.S. Const. Amend. 14. Sutton v. Bickell, 220 A.3d 1027 (Pa. 2019).

[END OF SUPPLEMENT]

Footnotes

1 Okla.—Harmon v. Cradduck, 2012 OK 80, 286 P.3d 643 (Okla. 2012).
Wash.—Greenhalgh v. Department of Corrections, 180 Wash. App. 876, 324 P.3d 771 (Div. 2 2014), review denied, 337 P.3d 326 (Wash. 2014).

2 U.S.—Webster v. Chevalier, 834 F. Supp. 628 (W.D. N.Y. 1993).
Meaningful opportunity to be heard
When a prisoner is threatened with a judicially sanctioned deprivation of property, due process requires a meaningful opportunity to be heard.
Cal.—Payne v. Superior Court, 17 Cal. 3d 908, 132 Cal. Rptr. 405, 553 P.2d 565 (1976).

3 Mass.—O'Malley v. Sheriff of Worcester County, 415 Mass. 132, 612 N.E.2d 641 (1993).
No constitutional entitlement to educational grants
A state prisoner did not have a constitutional entitlement to the continued receipt of Pell Grant funds, such as would trigger procedural due process protections prior to revocation; any constitutionally protected property right disappeared upon the enactment of a statutory amendment terminating prisoners' eligibility for Pell Grant awards.
U.S.—Nicholas v. Riley, 874 F. Supp. 10 (D.D.C. 1995), aff'd, 1995 WL 686227 (D.C. Cir. 1995).

4 U.S.—Jensen v. Klecker, 599 F.2d 243, 27 Fed. R. Serv. 2d 507 (8th Cir. 1979).

5 U.S.—Jensen v. Klecker, 599 F.2d 243, 27 Fed. R. Serv. 2d 507 (8th Cir. 1979).

Forfeiture of prison earnings

U.S.—Johnson v. Duffy, 588 F.2d 740 (9th Cir. 1978).

6 U.S.—Jensen v. Klecker, 599 F.2d 243, 27 Fed. R. Serv. 2d 507 (8th Cir. 1979).

7 U.S.—Mahers v. Halford, 76 F.3d 951 (8th Cir. 1996).

8 U.S.—X (Smith) v. Robinson, 456 F. Supp. 449 (E.D. Pa. 1978).

9 Iowa—Bruns v. State, 503 N.W.2d 607 (Iowa 1993).

Confiscation of contraband permitted

U.S.—Sullivan v. Ford, 609 F.2d 197 (5th Cir. 1980); Lowery v. Cuyler, 521 F. Supp. 430 (E.D. Pa. 1981).

10 U.S.—Hudson v. Palmer, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984); Graham v. Mitchell, 529 F. Supp. 622 (E.D. Va. 1982); Whorley v. Karr, 534 F. Supp. 88 (W.D. Va. 1981).

Right to stipend during prison lockdowns

Assuming that a prisoner had a property interest in a state stipend that was provided for in a state administrative directive, the prisoner failed to state a claim for a violation of procedural due process, relating to the prisoner not receiving the stipend during prison lockdowns, in the absence of allegations that the state's postdeprivation remedy was inadequate.

U.S.—Turley v. Rednour, 729 F.3d 645 (7th Cir. 2013).

Conversion

A civil action for wrongful conversion of person property under state law was an adequate postdeprivation remedy for a prisoner who alleged that prison officials unjustly denied his grievances and ignored his complaints that officials stole packages mailed to him, and thus, no procedural due process violation occurred.

U.S.—Moore v. McLaughlin, 569 Fed. Appx. 656 (11th Cir. 2014).

State tort claims procedure

A prison warden and corrections officers were not subject to liability in their individual capacities for violating an inmate's constitutional rights by wrongfully confiscating his personal property; the warden and corrections officers' alleged intentional and unauthorized confiscation of the inmate's property did not constitute a violation of the Due Process Clause of the Fourteenth Amendment when a meaningful postdeprivation remedy for the loss was available under a state tort claims procedure.

Ga.—Romano v. Georgia Dept. of Corrections, 303 Ga. App. 347, 693 S.E.2d 521 (2010).

11 U.S.—Stringer v. DeRobertis, 541 F. Supp. 605 (N.D. Ill. 1982), judgment aff'd, 738 F.2d 442 (7th Cir. 1984).

12 U.S.—Obriecht v. Raemisch, 565 Fed. Appx. 535 (7th Cir. 2014), cert. denied, 135 S. Ct. 190, 190 L. Ed. 2d 148 (2014) (prison library job); Turley v. Rednour, 729 F.3d 645 (7th Cir. 2013); Richard v. Fischer, 38 F. Supp. 3d 340 (W.D. N.Y. 2014).

13 U.S.—Richard v. Fischer, 38 F. Supp. 3d 340 (W.D. N.Y. 2014).

14 Tex.—In re Hart, 351 S.W.3d 71 (Tex. App. Texarkana 2011).

15 U.S.—Montanez v. Secretary Pennsylvania Dept. of Corrections, 773 F.3d 472 (3d Cir. 2014).

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16C C.J.S. Constitutional Law § 1760

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Constitutional Law
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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

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J. Judgment, Sentence, and Punishment; Appeal and Error

3. Execution of Sentence; Prisons and Prisoners

a. In General

§ 1760. What process is due a prisoner

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4820

In the prison setting, judgment on the constitutional issue of what process is due requires an accommodation between the special needs of the prison institution and the provisions of the Constitution that are of general application.

In the prison setting, judgment on the constitutional issue of what process is due requires an accommodation between the special needs of the prison institution and the provisions of the Federal Constitution that are of general application.[1] The procedure that is due a prisoner must be weighed against the competing interests of society and of other prisoners.[2] Thus, the process due a prisoner is flexible and calls for such procedural protections as the particular situation demands.[3]

In general, however, a prisoner is entitled as a matter of constitutional right to rudimentary due process under prison conditions, including notice, some opportunity to object either personally or in writing, and a decision by a body that can be expected to act fairly.[4]

Death row inmate.

Once a prisoner seeking a stay of execution has made a substantial threshold showing of insanity, the protection afforded by procedural due process includes a fair hearing in accord with fundamental fairness, which means the prisoner must be accorded an opportunity to be heard, though a constitutionally acceptable procedure may be far less formal than a trial.[5]

Deprivation of rights during emergency.

During an emergency, prison officials may temporarily deprive prisoners of their due process rights,[6] but minimal procedures to afford due process must be granted at the earliest practicable opportunity thereafter.[7] In any event, the determination of when an emergency action, by its severity or prolongation, reaches a point requiring due process protection must be based on a careful analysis of the unique factual situation presented by each case.[8]

Footnotes

1 U.S.—Jones v. Marquez, 526 F. Supp. 871 (D. Kan. 1981).

2 U.S.—Smith v. Rabalais, 659 F.2d 539 (5th Cir. 1981); Jordan v. Robinson, 464 F. Supp. 223 (W.D. Pa. 1979).

3 U.S.—Braxton v. Carlson, 483 F.2d 933 (3d Cir. 1973); Phillips v. Keve, 422 F. Supp. 1136 (D. Del. 1976).

Leeway of prison officials

Prison officials must be allowed some leeway in reconciling conflicting demands growing out of legitimate interests in prison security and organization and the equally legitimate interest in affording due process protections commensurable with the realities of prison life.

U.S.—Bickham v. Cannon, 516 F.2d 885 (7th Cir. 1975).

4 U.S.—Laaman v. Hancock, 351 F. Supp. 1265 (D.N.H. 1972).

5 U.S.—Panetti v. Quarterman, 551 U.S. 930, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007); Green v. Thaler, 699 F.3d 404 (5th Cir. 2012), as revised, (Oct. 31, 2012).

As to due process with respect to persons acquitted on ground of insanity, see §§ 1805, 1806.

6 U.S.—Carlo v. Gunter, 520 F.2d 1293 (1st Cir. 1975); Jefferson v. Southworth, 447 F. Supp. 179 (D.R.I. 1978), judgment aff'd, 616 F.2d 598 (1st Cir. 1980).

Postponement of hearing

A good-faith response to apprehended emergency conditions within a prison clearly falls within the ambit of the exception which exists in extraordinary situations which will justify postponing a hearing required by due process until after the event.

U.S.—La Batt v. Twomey, 513 F.2d 641 (7th Cir. 1975).

As to due process during an emergency with respect to lockups, generally, see § 1767.

As to due process during an emergency with respect to administrative segregation, generally, see § 1770.

7 U.S.—Carlo v. Gunter, 520 F.2d 1293 (1st Cir. 1975); Morris v. Travisono, 509 F.2d 1358 (1st Cir. 1975).

8 U.S.—Pepperling v. Crist, 678 F.2d 787 (9th Cir. 1982).

16C C.J.S. Constitutional Law § 1761

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XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

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3. Execution of Sentence; Prisons and Prisoners

a. In General

§ 1761. Prisoner's access to courts

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4827

Under the Due Process Clause, prisoners have a constitutional right of access to the courts, and states must insure that inmate access to the courts is adequate, effective, and meaningful.

Under the Due Process Clause, prisoners have a constitutional right of access to the courts, and states must insure that inmate access to the courts is adequate, effective, and meaningful.[1] Such access encompasses all means an inmate requires to get a fair hearing from the judiciary on charges brought against, or grievances alleged by, the inmate.[2]

The denial or undue restriction of the right of a prisoner of reasonable access to the courts is a denial of due process of law,[3] as where the prisoner is deprived of materials necessary to afford reasonable access to the courts,[4] such as a law library[5] or materials and facilities[6] necessary for self-representation,[7] or adequate assistance from persons trained in the law.[8]

However, due process of law requires no more than reasonable access to the courts, and reasonable restrictions and restraints on the right may be imposed.[9] Also, in order to establish a violation of the right, a prisoner must show an actual injury;[10] an inmate is not entitled to access to the courts merely to argue that there might be some remote possibility of some constitutional violation.[11] Similarly, the Due Process Clause is not meant to enable the prisoner to discover grievances,[12] and a prisoner does not have a due process right to file frivolous suits challenging prison conditions.[13]

Attendance at civil proceedings.

Under the due process clause, prisoners do not have an absolute constitutional right to be present in their own civil actions.[14] The trial court must weigh the interest of a plaintiff in presenting testimony in person against the interest of the State in maintaining the confinement of the plaintiff.[15] When examining whether a prisoner has a due process right to appear personally in a civil matter, the courts look to whether there are any reasonable alternative means by which the prisoner may be heard and thus obtain meaningful access to the court.[16] For example, an incarcerated person who is not allowed to appear at a divorce hearing is denied a day in court in violation of due process protections where such a person could easily be allowed to participate in the divorce hearing via conference call.[17]

CUMULATIVE SUPPLEMENT

Cases:

Under the Fourteenth Amendment, a state prisoner's legal documents have characteristics that differentiate them from mere "property" whose destruction can be adequately remedied by a generic property-deprivation state law; their theft or destruction may irrevocably hinder a prisoner's efforts to vindicate legal rights. U.S.C.A. Const.Amend. 14; McKinney's Court of Claims Act § 9. Willey v. Kirkpatrick, 801 F.3d 51 (2d Cir. 2015).

Prisoner's right of access to courts under First Amendment's Petition Clause and Fourteenth Amendment's Due Process Clause encompasses only reasonably adequate opportunity to file nonfrivolous legal claims challenging his convictions or conditions of confinement. U.S. Const. Amends. 1, 14. DeMarco v. Davis, 914 F.3d 383 (5th Cir. 2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Williams v. Hobbs, 658 F.3d 842, 80 Fed. R. Serv. 3d 1195 (8th Cir. 2011).
N.H.—Vincent v. MacLean, 166 N.H. 132, 89 A.3d 1208 (2014).
Tex.—In re Bonilla, 424 S.W.3d 528 (Tex. Crim. App. 2014).

2 U.S.—Padgett v. Stein, 406 F. Supp. 287 (M.D. Pa. 1975).
Rights to due process and access to courts not violated
The setting of the date of execution prior to the expiration of the five-year period for filing a petition for postconviction relief did not violate the right to due process, violate the right of access to the courts, violate the right to equal protection, or suspend the privilege of habeas corpus.
Mont.—State ex rel. Turner v. Montana Third Judicial Dist. Court, Powell County, 271 Mont. 392, 897 P.2d 1060 (1995).

3 Cal.—Payne v. Superior Court, 17 Cal. 3d 908, 132 Cal. Rptr. 405, 553 P.2d 565 (1976).
N.Y.—Sackinger v. Nevins, 114 Misc. 2d 454, 451 N.Y.S.2d 1005 (Sup 1982).
Opening correspondence from attorneys

Defendant jail officials' practice of opening correspondence from attorneys to prisoners outside the presence of the affected prisoner and, independently, the practice of reading such correspondence was an undue and unjustifiable burden on the prisoners' right of access to the courts.

U.S.—Dawson v. Kendrick, 527 F. Supp. 1252 (S.D. W. Va. 1981).

As to due process in connection with prisoner's correspondence, generally, see § 1762.

4 U.S.—Sigafus v. Brown, 416 F.2d 105 (7th Cir. 1969); Butler v. Bensinger, 377 F. Supp. 870 (N.D. Ill. 1974).

5 Ga.—Daker v. Humphrey, 294 Ga. 504, 755 S.E.2d 201 (2014).

Tex.—In re Bonilla, 424 S.W.3d 528 (Tex. Crim. App. 2014).

6 U.S.—Owens-El v. Robinson, 442 F. Supp. 1368 (W.D. Pa. 1978).

7 U.S.—Owens-El v. Robinson, 442 F. Supp. 1368 (W.D. Pa. 1978).

8 Ga.—Daker v. Humphrey, 294 Ga. 504, 755 S.E.2d 201 (2014).

Tex.—In re Bonilla, 424 S.W.3d 528 (Tex. Crim. App. 2014).

Legal counsel not required

Where inmates of a state prison had access to an adequate law library and to inmate writ writers, the Due Process Clause did not require the State to provide them with legal counsel.

U.S.—Stevenson v. Reed, 530 F.2d 1207 (5th Cir. 1976).

Consultation with attorney

A prison inmate has a due process right to consult privately with an attorney.

U.S.—Souza v. Travisono, 368 F. Supp. 959 (D.R.I. 1973), judgment aff'd, 498 F.2d 1120 (1st Cir. 1974).

9 U.S.—Ford v. Schmidt, 577 F.2d 408, 3 Fed. R. Evid. Serv. 127 (7th Cir. 1978).

No violation of due process shown

A prison regulation, which required convicts to state facts warranting the requested legal interview, did not deny convicts due process of law.

U.S.—Umfress v. Swenson, 336 F. Supp. 320 (W.D. Mo. 1971).

10 U.S.—Garland v. Horton, 129 Fed. Appx. 733 (3d Cir. 2005); Alvarez v. Attorney General for Fla., 679 F.3d 1257 (11th Cir. 2012).

11 Ga.—Owens v. Hill, 295 Ga. 302, 758 S.E.2d 794 (2014), cert. denied, 135 S. Ct. 449, 190 L. Ed. 2d 340 (2014).

12 U.S.—Williams v. Hobbs, 658 F.3d 842, 80 Fed. R. Serv. 3d 1195 (8th Cir. 2011).

13 Pa.—Richardson v. Com., Dept. of Corrections, 97 A.3d 430 (Pa. Commw. Ct. 2014), aff'd, 110 A.3d 994 (Pa. 2015).

14 N.H.—Vincent v. MacLean, 166 N.H. 132, 89 A.3d 1208 (2014).

Filing-fee requirement

An intermediate level of scrutiny applied to an inmate's claim that a prisoner filing-fee statute for civil actions against the State violated the state constitutional due process right to access to the courts; the burden on access was not overly onerous.

Alaska—Brandon v. Corrections Corp. of America, 28 P.3d 269 (Alaska 2001).

15 N.H.—Vincent v. MacLean, 166 N.H. 132, 89 A.3d 1208 (2014).

16 Mo.—Meadows v. Meadows, 330 S.W.3d 798 (Mo. Ct. App. S.D. 2011).

17 Wyo.—Murray v. Murray, 894 P.2d 607 (Wyo. 1995).

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3. Execution of Sentence; Prisons and Prisoners

a. In General

§ 1762. Prisoner's correspondence; outside publications

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4821

The interest of prisoners and their correspondents in uncensored communications by letter is a liberty interest, within the meaning of the Fourteenth Amendment, and it is protected from arbitrary governmental invasion.

The interest of prisoners and their correspondents in uncensored communications by letter is a liberty interest, within the meaning of the Fourteenth Amendment, and it is protected from arbitrary governmental invasion.[1] Regulations that affect the sending of correspondence to prisoners by individuals outside the prison are valid if they are reasonably related to legitimate penological interests.[2] A less deferential standard, whereby prison regulations authorizing mail censorship must be "generally necessary" to protect one or more legitimate governmental interests, is limited to regulations concerning outgoing personal correspondence from prisoners, which regulations are not centrally concerned with the maintenance of prison order and security.[3]

In analyzing a prison's restrictions on an individual inmate's receipt of mail, under the Due Process Clause, the court considers the existence of the following: (1) appropriate notice; (2) a reasonable opportunity to challenge the initial decision; and (3) an ultimate decision by a disinterested party not privy to the initial censorship decision.[4]

A requirement that mail from attorneys to prisoners be opened in the presence of the inmates, without being read by prison officials, does not infringe on the prisoners' due process rights.[5] On the other hand, a prison policy condoning indiscriminate reading of inmate correspondence to and from attorneys and judicial officers violates the constitutional right of due process.[6]

Outside publications.

Regulations that affect the sending of publications to prisoners are valid if they are reasonably related to legitimate penological interests.[7] With respect to the procedure for screening literature for receipt by prison inmates, such inmates are entitled as a matter of constitutional right to rudimentary due process under prison conditions,[8] including notice, some opportunity to object, and a decision by a body that can be expected to act fairly.[9] Regulations governing sending of subscription publications to federal prisoners serve a legitimate and neutral governmental objective and are rationally related to that objective and are thus valid.[10]

Mass mailings to prison inmates.

In the context of mass mailings to prison inmates, courts evaluate what process is due considering, first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[11]

Footnotes

1 U.S.—Procunier v. Martinez, 416 U.S. 396, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974) (overruled on other grounds by, Thornburgh v. Abbott, 490 U.S. 401, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989)); Stanley v. Vining, 602 F.3d 767 (6th Cir. 2010); Prison Legal News v. Chapman, 44 F. Supp. 3d 1289 (M.D. Ga. 2014).
Prison regulations
Prison regulations concerning mail to and from prisoners may infringe upon rights under the Fourteenth Amendment.
Idaho—McClellan v. May, 98 Idaho 309, 562 P.2d 812 (1977).
No violation of due process shown
(1) A policy whereby all nonprivileged mail addressed to an inmate is opened and read by prison authorities does not constitute a violation of due process inasmuch as the inmate has no expectation of privacy where a state regulation provides notice of the prison officials' right to open mail.
U.S.—Cofone v. Manson, 409 F. Supp. 1033 (D. Conn. 1976).
(2) A regulation permitting the reading of inmates' nonprivileged outgoing mail did not violate the First or Fourteenth Amendments since the regulation was generally necessary to further substantial governmental interests in security, order, and rehabilitation.
Conn.—Washington v. Meachum, 238 Conn. 692, 680 A.2d 262 (1996).

2 U.S.—Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).
Withholding of mail to inmate in disciplinary detention
Whenever an inmate's mail is to be temporarily withheld because the inmate has been placed in disciplinary detention, due process requires that the inmate receive written notice of the identity of the correspondent, the reason mail is being withheld, and the name of the withholding officer.

U.S.—Gregory v. Auger, 768 F.2d 287 (8th Cir. 1985).

As to due process with respect to disciplinary confinement or segregation, see § 1772.

3 U.S.—Thornburgh v. Abbott, 490 U.S. 401, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989).

4 U.S.—Prison Legal News v. Chapman, 44 F. Supp. 3d 1289 (M.D. Ga. 2014).

5 U.S.—Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

6 U.S.—Frazier v. Donelon, 381 F. Supp. 911 (E.D. La. 1974), aff'd, 520 F.2d 941 (5th Cir. 1975).

A.L.R. Library

Censorship of convicted prisoners' "nonlegal" mail, 47 A.L.R.3d 1192.

Censorship of convicted prisoners' "legal" mail, 47 A.L.R.3d 1150.

7 U.S.—Thornburgh v. Abbott, 490 U.S. 401, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989); Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

8 U.S.—Sostre v. Otis, 330 F. Supp. 941 (S.D. N.Y. 1971).

9 U.S.—Sostre v. Otis, 330 F. Supp. 941 (S.D. N.Y. 1971).

10 U.S.—Thornburgh v. Abbott, 490 U.S. 401, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989).

11 U.S.—Perry v. Secretary, Florida Dept. of Corrections, 664 F.3d 1359 (11th Cir. 2011).

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16C C.J.S. Constitutional Law § 1763

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Constitutional Law
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J. Judgment, Sentence, and Punishment; Appeal and Error

3. Execution of Sentence; Prisons and Prisoners

a. In General

§ 1763. Prison visitation

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4821

Prison visitation regulations may create a liberty interest in visitation which cannot be abridged without affording the inmates due process.

The Due Process Clause does not in itself create a liberty interest in prisoner visitation.[1]

A prison's visitation regulations may create a liberty interest in visitation which cannot be abridged without affording the inmates due process.[2] On the other hand, prison regulations that lack mandatory language conferring visitation rights do not give inmates a liberty interest in receiving visitors that is protectable by the Due Process Clause.[3] For example, a state's correctional system's family reunion program does not confer upon an inmate a constitutionally protected right to conjugal visits in prison where the relevant regulations contain no specific set of criteria that, when met, would make participation in the program mandatory or that would significantly limit the discretion of prison officials in deciding the best candidates for program participation.[4]

CUMULATIVE SUPPLEMENT

Cases:

Correctional officers sued under § 1983 by inmate for allegedly violating his due process and freedom of association rights in denying him visits with his daughter, had legitimate penological reason for any such denial of visits, and thus were not liable under § 1983, where officers were prohibited from considering requests for visits unless requirements of Wisconsin's formal visitation process were met, and warden exercised his discretion, under visitation process, to deny request based on requirement that inmate complete sex offender treatment before being allowed to visit daughter. U.S. Const. Amends. 1, 5; 42 U.S.C.A. § 1983; Wis. Admin. Code DOC § 309.08(1)(b). Easterling v. Thurmer, 880 F.3d 319 (7th Cir. 2018).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Williams v. Ozmint, 716 F.3d 801 (4th Cir. 2013), petition for certiorari filed, 134 S. Ct. 1294, 188 L. Ed. 2d 320 (2014); Hernandez v. Cate, 918 F. Supp. 2d 987 (C.D. Cal. 2013).
Idaho—Lightner v. Hardison, 149 Idaho 712, 239 P.3d 817 (Ct. App. 2010).
Ill.—Montes v. Taylor, 369 Ill. Dec. 51, 985 N.E.2d 1037 (App. Ct. 4th Dist. 2013).
A.L.R. Library
Right of Jailed or Imprisoned Parent to Visit from Minor Child, 6 A.L.R.6th 483, §§ 4, 5.

2 U.S.—Patchette v. Nix, 952 F.2d 158 (8th Cir. 1991).

3 U.S.—Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989).
Constitutional rights not violated
Prison regulations that excluded, from the family members with whom inmates were entitled to noncontact visits, any minor nieces and nephews and children as to whom parental rights had been terminated, that prohibited inmates from visiting with former inmates, that required children to be accompanied by a family member or legal guardian during visitation, and that subjected inmates with two substance-abuse violations to a ban of at least two years on future visitation, subject to their right to apply for a lifting of the ban after two years, were rationally related to legitimate penological objectives, including those of deterring the use of alcohol and drugs in the prison, maintaining internal security, and protecting child visitors; the regulations did not violate substantive due process or the free association guarantee of the First Amendment, given other avenues of communication available to the inmates, the impact that a fuller accommodation of asserted associational rights would have on guards, other inmates, allocation of prison resources, and the safety of visitors, and the nonnegligible effects which an increase in the number of visitors would have on the goals served by regulations.
U.S.—Overton v. Bazzetta, 539 U.S. 126, 123 S. Ct. 2162, 156 L. Ed. 2d 162, 6 A.L.R.6th 731 (2003).

4 U.S.—Hernandez v. Coughlin, 18 F.3d 133 (2d Cir. 1994).

16C C.J.S. Constitutional Law § 1764

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J. Judgment, Sentence, and Punishment; Appeal and Error

3. Execution of Sentence; Prisons and Prisoners

a. In General

§ 1764. Prisoner rehabilitation and treatment programs

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4821

Absent a statutory right created by state law, a state prisoner generally has no constitutionally protected liberty or other interest in the prisoner's eligibility for rehabilitation programs.

In general, absent a statutory right created by state law, a state prisoner has no constitutionally protected liberty or other interest in the prisoner's eligibility for rehabilitation programs.[1] Prison classification and eligibility for various rehabilitation programs, wherein prison officials have full discretion to control those conditions of confinement, do not create a statutory or constitutional entitlement sufficient to invoke due process.[2] Thus, a prisoner's deprivation of certain training and rehabilitative programs does not violate the Due Process Clause where the institutional programs are not accorded the prisoner as a matter of right and are not protected by the constitutional guarantee of due process.[3]

On the other hand, where inmates have been sentenced to an institution which, under the mandate of the legislature, is required to make available certain rehabilitation procedures, the inmates are entitled to receive such treatment, and the failure to grant such

treatment to them infringes the constitutional requirements of due process.[4] Similarly, where a community treatment program is created by the State and the bureau of prisons is statutorily required to establish procedures for screening, selecting, and referring inmates to community treatment centers, a prisoner's interest in the program is sufficiently embraced within the liberty interest protected by the Fourteenth Amendment to entitle the prisoner to minimum procedures appropriate under the circumstances in order to insure that the state-created right is not arbitrarily abrogated.[5]

A decision by the appropriate state official not to establish and maintain a drug treatment and rehabilitation program for prison inmates does not deprive a prisoner of liberty without due process of law,[6] and the confinement in a particular correctional facility does not violate a prisoner's rights under the Fourteenth Amendment on the ground that the institution lacks an adequate drug rehabilitation program.[7] Furthermore, the exclusion from a state narcotics rehabilitation center does not involve an interest in liberty protected by the Due Process Clause.[8] Where neither the constitution nor statutes endow a drug addicted inmate with a justifiable expectation that such inmate will be transferred from prison to a residential drug treatment center, the failure to make such a transfer does not deny the inmate due process.[9]

The stigmatizing effects on an inmate of being labeled a sex offender, when coupled with mandatory behavioral modification therapy, triggers an independent liberty interest emanating from the Due Process Clause.[10] An inmate may possess a limited liberty interest in refusing to participate in a sexual offender program, but that interest may be overcome by legitimate penological interests in promoting rehabilitation.[11] A prisoner has no protected liberty interest in obtaining sex offender treatment while still incarcerated.[12]

Termination of commitment to drug treatment facility.

Due process requires that a defendant's commitment to a drug treatment facility, as an alternative to imprisonment, not be terminated for misconduct or unacceptability until the defendant receives written notice of the grounds alleged to justify terminating the commitment, disclosure of the evidence against the defendant, an opportunity to be heard and present evidence before the committing court, and the right to confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation.[13]

Footnotes

1 U.S.—Reddin v. Israel, 455 F. Supp. 1215 (E.D. Wis. 1978).

2 Conn.—Fuller v. Commissioner of Correction, 144 Conn. App. 375, 71 A.3d 689 (2013), certification denied, 310 Conn. 946, 80 A.3d 907 (2013).
As to due process with respect to classification of prisoners, see § 1769.

3 U.S.—Collins v. Ward, 544 F. Supp. 408 (S.D. N.Y. 1982).

4 N.Y.—People ex rel. Cromwell v. Warden, 74 Misc. 2d 642, 345 N.Y.S.2d 381 (Sup 1973).
Substantive due process
Inmates incarcerated in state prisons have a right to rehabilitation established by statute and enforceable through the substantive due process mandate of the state constitution.
W. Va.—Bishop v. McCoy, 174 W. Va. 99, 323 S.E.2d 140 (1984).

5 U.S.—U. S. ex rel. Myers v. Sielaff, 381 F. Supp. 840 (E.D. Pa. 1974).

6 Wash.—State v. Barnett, 17 Wash. App. 53, 561 P.2d 234 (Div. 1 1977).

7 N.Y.—People ex rel. Cicerani v. Metz, 54 A.D.2d 774, 387 N.Y.S.2d 488 (3d Dep't 1976).

8 U.S.—Ingram v. Rees, 407 F. Supp. 226 (N.D. Cal. 1976).

9 U.S.—Fiallo v. De Batista, 666 F.2d 729 (1st Cir. 1981).

As to due process in connection with the transfer of a prisoner from one institution to another, generally, see § 1766.

10 U.S.—Renchenski v. Williams, 622 F.3d 315, 77 Fed. R. Serv. 3d 937 (3d Cir. 2010).

11 U.S.—Sundby v. Fiedler, 827 F. Supp. 580 (W.D. Wis. 1993).

12 Neb.—In re S.C., 283 Neb. 294, 810 N.W.2d 699 (2012).

13 Iowa—State v. Grimme, 274 N.W.2d 331 (Iowa 1979).

As to the confinement, examination, and commitment of mentally disordered or addicted defendants, see §§ 1798 to 1811.

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3. Execution of Sentence; Prisons and Prisoners

a. In General

§ 1765. Prison prerelease programs

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4830

A state choosing to establish a prerelease program may accord broad discretion to those deciding who may participate, but once such a program is established, due process considerations attach, placing outer limits on the exercise of official discretion.

Although there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence, an individual already enjoying certain forms of conditional release has a protected liberty interest in retaining them.[1] A state choosing to establish a prerelease program may accord broad discretion to those deciding who may participate, but once such a program is established, due process considerations attach, placing outer limits on the exercise of official discretion.[2] For example, in making their decision, the reviewing officials may not consider factors lying outside the statutorily prescribed bounds of their discretion,[3] and likewise, participation in such a program may not be denied for arbitrary or constitutionally impermissible reasons.[4]

Furthermore, a prisoner's prerelease status amounts to a liberty interest protected by the Due Process Clause,[5] and due process may require that a prisoner facing the loss of prerelease status be heard by a panel which has not prejudged the prisoner's case and "sentenced" the prisoner before the hearing.[6] In addition, the prisoner should be given the opportunity to present the prisoner's case, including the opportunity to confront witnesses against the prisoner as well as to present witnesses on the prisoner's own behalf.[7]

Some courts have reasoned that a liberty interest arises when a prisoner meets work-release eligibility requirements, and release would be consistent with established work-release policy[8] although other courts have rejected this reasoning.[9] In this regard, language in a department of corrections manual requiring a due process hearing before an inmate's participation in a work-release program could be terminated prevents the department from arbitrarily removing an inmate from the work-release program and thus creates a liberty interest in an inmate's continued participation in the program.[10]

The due process applicable to an inmate removed from a preparole conditional supervision program is that applicable to a participant in a parole program.[11] Likewise, if participation in an extended furlough program is substantially the same as release on parole and there are sufficiently specific criteria for participation in the program to give rise to a liberty interest, participation in an extended furlough program cannot be revoked without due process.[12]

CUMULATIVE SUPPLEMENT

Cases:

Notice, an opportunity to be heard and respond, and a written statement of reasons were appropriate procedural protections to be afforded to inmates who sought release or medical furlough from prison due to COVID-19 pandemic under executive order providing opportunity for inmates at high risk from COVID-19, who were eligible for parole within 90 days, or whose sentences would end within 90 days to request release or furlough; such procedures would properly balance state's interests in ensuring that inmates fulfilled the punitive aspects of their sentence and in complying with executive order with interests of inmates who had liberty interest in being free from physical restraint that was heightened by widespread presence of COVID-19 in prisons. U.S. Const. Amend. 14. Matter of Request to Modify Prison Sentences, 242 N.J. 357, 231 A.3d 667 (2020).

[END OF SUPPLEMENT]

Footnotes

1 **Electronic supervision program**
Prisoners convicted of murder, who had been released for several years pursuant to an electronic supervision program (ESP), had a protected due-process liberty interest in their continued participation in the ESP program, despite the fact that their releases were premised on a lower court determination, which was later overturned, that the statute eliminating such prisoners from the program violated the ex post facto clause; the prisoners were serving out the remainder of their sentences in their homes, where they lived either with close relatives, significant others, or spouses, and children, and although they were subject to monitoring with an electronic tracking anklet, and routine drug and alcohol testing, they were authorized to work at a job or attend school.
U.S.—Gonzalez-Fuentes v. Molina, 607 F.3d 864 (1st Cir. 2010).

2 U.S.—Rowe v. Cuyler, 534 F. Supp. 297 (E.D. Pa. 1982), aff'd, 696 F.2d 985 (3d Cir. 1982).

3 U.S.—Rowe v. Cuyler, 534 F. Supp. 297 (E.D. Pa. 1982), aff'd, 696 F.2d 985 (3d Cir. 1982).

4 U.S.—Rowe v. Cuyler, 534 F. Supp. 297 (E.D. Pa. 1982), aff'd, 696 F.2d 985 (3d Cir. 1982).

5 U.S.—U. S. ex rel. Flores v. Cuyler, 511 F. Supp. 386 (E.D. Pa. 1981).

6 U.S.—U. S. ex rel. Flores v. Cuyler, 511 F. Supp. 386 (E.D. Pa. 1981).

7 U.S.—U. S. ex rel. Flores v. Cuyler, 511 F. Supp. 386 (E.D. Pa. 1981).

8 U.S.—Winsett v. McGinnes, 617 F.2d 996 (3d Cir. 1980).

9 U.S.—Baumann v. Arizona Dept. of Corrections, 754 F.2d 841 (9th Cir. 1985).

10 Ala.—Ex parte Berry, 794 So. 2d 307 (Ala. 2000).

11 U.S.—Young v. Harper, 520 U.S. 143, 117 S. Ct. 1148, 137 L. Ed. 2d 270 (1997).

Inability to present witnesses not violative

Okla.—Barnett v. Moon, 1993 OK CR 17, 852 P.2d 161 (Okla. Crim. App. 1993).

As to due process with respect to revocation of parole, generally, see § 1792.

12 U.S.—Wilson v. Loftus, 489 F. Supp. 996 (D. Del. 1980).

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3. Execution of Sentence; Prisons and Prisoners

a. In General

§ 1766. Transfer from one prison institution to another

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4828

The Due Process Clause, in and of itself, does not protect a duly convicted prisoner against transfer from one institution to another, but a prisoner's transfer may infringe a due-process liberty interest where there exists some right or justifiable expectation rooted in state law that the prisoner will not be transferred except for misbehavior or upon the occurrence of specified events.

The Due Process Clause, in and of itself, does not protect a duly convicted prisoner against transfer from one institution to another.[1] Whatever expectation a prisoner may have in remaining at a particular prison so long as the prisoner behaves is too ephemeral and insubstantial to trigger due process protection[2] as long as the prison officials have the discretion to transfer the prisoner for whatever reason or for no reason at all.[3] Thus, such a transfer generally does not constitute a violation of a prisoner's due process rights.[4] However, a liberty interest arises when a prison condition imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.[5] For example, a transfer from home confinement to prison confinement amounts to a sufficiently severe change in conditions to implicate due process.[6]

Where under state law a prisoner has no right to remain at any particular prison facility, and has no justifiable expectation that the prisoner will not be transferred unless found guilty of misconduct, and under state law the transfer of an inmate is not conditional upon or limited to the occurrence of misconduct, due process does not require a hearing in connection with a prisoner's transfer.[7] Moreover, the Due Process Clause of the Fourteenth Amendment does not entitle state prisoners to a hearing when they are transferred to a prison the conditions of which are substantially less favorable to the prisoners,[8] absent a state law or practice conditioning such transfers on proof of serious misconduct or the occurrence of other events.[9] Furthermore, as long as the conditions or degree of confinement to which a prisoner is subjected are within the sentence imposed upon the prisoner and are not otherwise violative of the Federal Constitution, the Due Process Clause does not in itself require hearings in connection with transfers whether they are the result of an inmate's misbehavior or whether they are labeled as disciplinary or punitive.[10]

On the other hand, a prisoner's transfer may infringe a liberty interest protected by the Due Process Clause where there exists some right or justifiable expectation rooted in state law that the prisoner will not be transferred except for misbehavior or upon the occurrence of specified events.[11] Such right may be created by statute[12] or by rules and regulations[13] or official policies or practices.[14] Once a justifiable expectation of remaining at a particular prison is demonstrated, a state cannot, under the Due Process Clause, deprive a prisoner of that right without providing the prisoner with a hearing.[15]

Transfer to another state.

Prisoners do not have a due process right to be housed in a certain prison or even a certain state.[16] The interstate transfer of an inmate does not deprive the inmate of any liberty interest protected by the Due Process Clause of the Fourteenth Amendment.[17]

Footnotes

1 U.S.—Meachum v. Fano, 427 U.S. 215, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976).
Conn.—Coleman v. Commissioner of Correction, 111 Conn. App. 138, 958 A.2d 790 (2008).
Wash.—In re Lain, 179 Wash. 2d 1, 315 P.3d 455 (2013).
Transfer from Hawaii to mainland
U.S.—Olim v. Wakinekona, 461 U.S. 238, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983).
Absence of liberty interest
An inmate had no Fourteenth Amendment liberty interest in being imprisoned at a county jail, rather than at a state prison, where state law did not confer such a right upon the inmate, who was confined prior to sentencing, at the time he was transferred to the prison from the county jail.
U.S.—Maddox v. Thomas, 671 F.2d 949 (5th Cir. 1982).

2 U.S.—Meachum v. Fano, 427 U.S. 215, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976); Pugliese v. Nelson, 617 F.2d 916 (2d Cir. 1980); Simmat v. Manson, 535 F. Supp. 1115 (D. Conn. 1982).

3 U.S.—Olim v. Wakinekona, 461 U.S. 238, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983); Meachum v. Fano, 427 U.S. 215, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976); Pugliese v. Nelson, 617 F.2d 916 (2d Cir. 1980).

4 U.S.—Coleman v. Brown, 28 F. Supp. 3d 1068 (E.D. Cal. 2014).
Temporary transfer to mental health facility
U.S.—Green v. Dormire, 691 F.3d 917 (8th Cir. 2012).
Transfer to more secure facility
An inmate does not have a constitutional right to a particular custody classification, and a transfer to a more secure facility does not by itself implicate a protected liberty interest entitled to due process protection even though the conditions of confinement are more burdensome.
Colo.—Deason v. Kautzky, 786 P.2d 420 (Colo. 1990).
As to due process with respect to classification of inmates, see § 1769.

5 § 1767.

6 U.S.—Ortega v. U.S. Immigration and Customs Enforcement, 737 F.3d 435 (6th Cir. 2013), petition for certiorari filed, 135 S. Ct. 48, 190 L. Ed. 2d 29 (2014).

7 U.S.—Montanye v. Haymes, 427 U.S. 236, 96 S. Ct. 2543, 49 L. Ed. 2d 466 (1976).

8 U.S.—Meachum v. Fano, 427 U.S. 215, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976).

9 U.S.—Meachum v. Fano, 427 U.S. 215, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976); Maddox v. Thomas, 671 F.2d 949 (5th Cir. 1982); Dozier v. Hilton, 507 F. Supp. 1299 (D.N.J. 1981).

10 U.S.—Montanye v. Haymes, 427 U.S. 236, 96 S. Ct. 2543, 49 L. Ed. 2d 466 (1976); McDonnell v. U.S. Atty. Gen., 420 F. Supp. 217 (E.D. Ill. 1976).

11 U.S.—Cofone v. Manson, 594 F.2d 934 (2d Cir. 1979).

Specific standard

If a state itself imposes limits on its discretion by conditioning decisions such as prison transfers on a specific standard being met, the State creates a liberty interest which is protected by due process.

U.S.—Wright v. Enomoto, 462 F. Supp. 397 (N.D. Cal. 1976), judgment aff'd, 434 U.S. 1052, 98 S. Ct. 1223, 55 L. Ed. 2d 756 (1978).

12 U.S.—Garcia v. De Batista, 642 F.2d 11 (1st Cir. 1981); Wright v. Enomoto, 462 F. Supp. 397 (N.D. Cal. 1976), judgment aff'd, 434 U.S. 1052, 98 S. Ct. 1223, 55 L. Ed. 2d 756 (1978).

13 U.S.—Garcia v. De Batista, 642 F.2d 11 (1st Cir. 1981); Mitchell v. Hicks, 614 F.2d 1016 (5th Cir. 1980); Lamb v. Hutto, 467 F. Supp. 562 (E.D. Va. 1979).

14 U.S.—Mitchell v. Hicks, 614 F.2d 1016 (5th Cir. 1980).

15 U.S.—Santori v. Fong, 484 F. Supp. 1029 (E.D. Pa. 1980).

16 Wash.—In re Matteson, 142 Wash. 2d 298, 12 P.3d 585 (2000).

17 Colo.—Slater v. McKinna, 997 P.2d 1196 (Colo. 2000).

No due process right to pretransfer hearing

Inmates temporarily transferred to privately operated out-of-state facilities did not have a due process right to a pretransfer hearing where no rule required such a hearing, the transfers were not made for sentencing or disciplinary reasons raising concerns as to possible arbitrariness, the inmates had an administrative right of appeal of transfer decisions, and various criteria went into making transfer decisions.

Wash.—In re Matteson, 142 Wash. 2d 298, 12 P.3d 585 (2000).

As to what process is due with respect to disciplinary proceedings, generally, see § 1774.

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16C C.J.S. Constitutional Law § 1767

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b. Place and Conditions of Confinement

§ 1767. Place and conditions of confinement, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4821, 4825

The Due Process Clause does not itself create a protected interest in the initial assignment of offenders to a particular place of confinement.

In general, the initial decision to assign a convict to a particular institution is not subject to audit under the Due Process Clause even though the degree of confinement in one prison may be quite different from that in another.[1] The conviction has sufficiently extinguished defendant's liberty interest to empower the State to confine defendant in any of its prisons.[2] Indeed, just as an inmate has no justifiable expectation of being incarcerated in any particular prison within a state, an inmate has no justifiable expectation of being incarcerated in any particular state.[3] Thus, the Due Process Clause does not itself create a protected interest in the initial assignment of offenders to a particular place of confinement.[4]

On the other hand, state inmates have a liberty interest protected by the Fourteenth Amendment's Due Process Clause in avoiding assignment to a state's supermax prison, as such an assignment imposes an atypical and significant hardship on an inmate in

relation to ordinary incidents of prison life, where almost all human contact is prohibited for an inmate placed in the facility, the duration of the assignment is indefinite, and the assignment disqualifies an otherwise eligible inmate for parole consideration.[5] However, applying the procedural due process balancing test of *Mathews v. Eldridge*,[6] informal, nonadversary procedures for placement of an inmate in a supermax prison are adequate to safeguard an inmate's liberty interest in not being assigned to such a facility where the procedures call for the inmate to receive notice of the factual basis for supermax placement, opportunities for rebuttal, and multiple levels of review of any decision recommending such placement.[7]

The Due Process Clause imposes a duty on the State for the safety and general well-being of an incarcerated individual.[8] Harsh and atypical confinement conditions at a prison do not, in and of themselves, give rise to a due-process liberty interest in their avoidance.[9] A liberty interest arises only when the condition imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.[10] The inmate must show that the conditions, either alone or in combination, pose an unreasonable risk of serious damage to the inmate's health.[11] The duration and indeterminacy of a placement in extreme conditions is often critical consideration in due-process liberty interest analysis.[12] The Eighth Amendment's limitations on the conditions in which the federal government may confine those convicted of crime are applicable to the states through the Fourteenth Amendment.[13] The Due Process Clause of the Fourteenth Amendment affords no greater protection to an inmate than does the Cruel and Unusual Punishment Clause of the Eighth Amendment.[14]

In determining whether conditions of confinement are unconstitutional under the constitutional guarantee of due process, the court does not assay separately each of the institutional practices but looks to the totality of conditions.[15] However, the failure to provide a prisoner with an environment that does not impair the prisoner's physical and mental health generally violates due process rights.[16]

In general, the treatment of prisoners must be free from the arbitrary and capricious actions of prison officials.[17]

Changes in conditions of confinement.

Changes in the conditions of confinement having a substantial adverse impact on a prisoner are not alone sufficient to invoke the protections of the Due Process Clause[18] as long as the conditions or degree of confinement to which the prisoner is subjected are within the sentence imposed upon the prisoner.[19]

Lockup.

In general, a prison-wide lockup does not deprive inmates of due process where the prison officials' actions in ordering the lockup are reasonable responses to an emergency situation,[20] but the deprivations associated with an institutional lockup may constitute a due process violation if they persist too long.[21]

Shakedown searches.

A county jail's practice of conducting random, irregular searches of pretrial detainees' cells in the absence of the detainees is a reasonable response by jail officials to legitimate security concerns and does not violate due process.[22]

CUMULATIVE SUPPLEMENT

Cases:

Deputy did not fail to protect inmate, in violation of the Fourteenth Amendment, with respect to inmate's mainframe housing placement, which he contended led to his attack by three fellow inmates; deputy was not responsible for inmate housing assignments at that time, and he was not working on date when attack on inmate occurred. U.S. Const. Amend. 14. Barnes v. Harling, 368 F. Supp. 3d 573 (W.D. N.Y. 2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Meachum v. Fano, 427 U.S. 215, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976); Gonzalez-Fuentes v. Molina, 607 F.3d 864 (1st Cir. 2010); Akers v. Watts, 740 F. Supp. 2d 83 (D.D.C. 2010).

2 U.S.—Meachum v. Fano, 427 U.S. 215, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976).

3 U.S.—Olim v. Wakinekona, 461 U.S. 238, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983).

4 U.S.—Ramos v. Lamm, 485 F. Supp. 122 (D. Colo. 1979), judgment aff'd in part, set aside in part on other grounds, 639 F.2d 559 (10th Cir. 1980).

Prisoner suffering from infectious disease

A prisoner diagnosed as HIV-positive and with hepatitis C did not have a protected liberty interest in placement in a single cell.

U.S.—Mearin v. Greene, 555 Fed. Appx. 156 (3d Cir. 2014).

5 U.S.—Wilkinson v. Austin, 545 U.S. 209, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005).

6 U.S.—Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

7 U.S.—Wilkinson v. Austin, 545 U.S. 209, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005).

8 U.S.—Connor B. ex rel. Vigurs v. Patrick, 774 F.3d 45 (1st Cir. 2014).

Protecting inmates from violent assaults at hands of fellow prisoners

U.S.—Smith v. Sangamon County Sheriff's Dept., 715 F.3d 188 (7th Cir. 2013); Byron v. Dart, 825 F. Supp. 2d 958 (N.D. Ill. 2011).

9 U.S.—Prieto v. Clarke, 780 F.3d 245 (4th Cir. 2015).

Smoking ban

A smoking ban in prison was not an atypical and significant hardship on prisoners and therefore did not violate a prisoner's due process rights.

U.S.—Antonetti v. Skolnik, 748 F. Supp. 2d 1201 (D. Nev. 2010).

10 Pa.—Mays v. Kosinski, 86 A.3d 945 (Pa. Commw. Ct. 2014).

Factors considered

A court looks at three factors to determine if a deprivation was atypical with respect to the hardships of prison life as required to support a due process claim: (1) whether the conditions of confinement mirrored those conditions imposed upon inmates in analogous discretionary confinement settings, namely administrative segregation and protective custody; (2) the duration and intensity of the conditions of confinement; and (3) whether the change in confinement would inevitably affect the duration of the prisoner's sentence.

U.S.—Hernandez v. Cox, 989 F. Supp. 2d 1062 (D. Nev. 2013).

Behavior action plan

A behavior action plan of an inmate who suffered from significant mental illness resulted in an atypical and significant hardship compared to ordinary prison life, and thus, an inmate had a liberty interest in not being placed on the plan sufficient to support his Fourteenth Amendment due process challenge against prison officials where the plan involved removal of the inmate's personal property from his cell, provision of a bag lunch, provision of a paper gown, and limited access to toiletries.

U.S.—Townsend v. Cooper, 759 F.3d 678 (7th Cir. 2014).

11 U.S.—Cano v. City of New York, 44 F. Supp. 3d 324 (E.D. N.Y. 2014).

12 U.S.—Rezaq v. Nalley, 677 F.3d 1001 (10th Cir. 2012).

13 U.S.—McMurry v. Phelps, 533 F. Supp. 742 (W.D. La. 1982) (overruled on other grounds by, Thorne v. Jones, 765 F.2d 1270 (5th Cir. 1985)).

Physical integrity

The Eighth Amendment, as incorporated by the Fourteenth Amendment, provides state convicts with a limited right of physical integrity.

U.S.—Henderson v. Counts, 544 F. Supp. 149 (E.D. Va. 1982).

14 Okla.—Medina v. State, 1993 OK 121, 871 P.2d 1379 (Okla. 1993).

Deliberate use of excessive force

The Due Process Clause of the Fourteenth Amendment afforded no greater protection than did the Cruel and Unusual Punishment Clause of the Eighth Amendment to a prisoner who claimed that deliberate use of force against him during the quelling of a prison riot was excessive and unjustified.

U.S.—Whitley v. Albers, 475 U.S. 312, 106 S. Ct. 1078, 89 L. Ed. 2d 251 (1986).

15 U.S.—Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981) (overruled on other grounds by, International Woodworkers of America, AFL-CIO and its Local No. 5-376 v. Champion Intern. Corp., 790 F.2d 1174, 4 Fed. R. Serv. 3d 721 (5th Cir. 1986)).

A.L.R. Library

Propriety and construction of "totality of conditions" analysis in federal court's consideration of Eighth Amendment challenge to prison conditions, 85 A.L.R. Fed. 750.

16 U.S.—Adams v. Mathis, 458 F. Supp. 302 (M.D. Ala. 1978), judgment aff'd, 614 F.2d 42 (5th Cir. 1980).

Nutritious food

Failure to properly prepare and serve nutritionally adequate food to inmates, who, due to their confinement, are unable to seek alternative sources of nutrition, constitutes violation of inmates' Fourteenth Amendment rights.

U.S.—Adams v. Mathis, 458 F. Supp. 302 (M.D. Ala. 1978), judgment aff'd, 614 F.2d 42 (5th Cir. 1980).

17 U.S.—McCray v. Bennett, 467 F. Supp. 187 (M.D. Ala. 1978).

Work assignments

Prison officials' conduct in assigning work to a prisoner with a heart condition did not amount to a violation of the Fifth Amendment, in view of evidence that the prison officials acted reasonably in their treatment of the prisoner and that the officials did not act in an arbitrary or capricious manner.

U.S.—Shepard v. Stidham, 502 F. Supp. 1275 (M.D. Ala. 1980).

18 U.S.—Vitek v. Jones, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980); Chappell v. Mandeville, 706 F.3d 1052 (9th Cir. 2013).

Cal.—In re Johnson, 176 Cal. App. 4th 290, 97 Cal. Rptr. 3d 692 (5th Dist. 2009), as modified, (Aug. 12, 2009).

Fla.—John v. Crews, 149 So. 3d 149 (Fla. 1st DCA 2014).

As to due process in connection with a change of classification of a prisoner, generally, see § 1769.

19 U.S.—Vitek v. Jones, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980); Houston v. Cotter, 7 F. Supp. 3d 283 (E.D. N.Y. 2014).

20 U.S.—Clifton v. Robinson, 500 F. Supp. 30 (E.D. Pa. 1980).

As to the process due prisoners during emergencies, generally, see § 1760.

21 U.S.—Pepperling v. Crist, 678 F.2d 787 (9th Cir. 1982).

22 U.S.—Block v. Rutherford, 468 U.S. 576, 104 S. Ct. 3227, 82 L. Ed. 2d 438 (1984).

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16C C.J.S. Constitutional Law § 1768

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§ 1768. Prisoner's medical care; right to refuse unwanted treatment or medication

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4823

Due process mandates that medical care be provided to one who is incarcerated and may be suffering from serious illness or injury. The Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against the inmate's will if the inmate is dangerous to him- or herself or to others and treatment is in the inmate's medical interest.

Due process mandates that medical care be provided to one who is incarcerated and may be suffering from serious illness or injury.[1] Thus, the failure or refusal to provide medical care to a prison inmate,[2] or the provision of inadequate medical services,[3] may violate due process.Officials violate their duty if they display deliberate indifference to serious medical needs of prisoners.[4] Of course, it should be remembered that an inadvertent failure to provide adequate medical care cannot be said to constitute an unnecessary and wanton infliction of pain or to be repugnant to the conscience of mankind.[5]

Inmates have a constitutionally protected liberty interest in refusing the medical treatment they are offered by correction officials,[6] but a prison may compel the prisoner to accept the treatment when the officials, in the exercise of professional judgment, deem it necessary to carry out valid medical or penological objectives.[7]

Administration of antipsychotic medication.

While an inmate has a protected liberty interest in avoiding the administration of antipsychotic medication,[8] the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against the inmate's will if the inmate is dangerous to him- or herself or to others and treatment is in the inmate's medical interest.[9] However, forcing an antipsychotic drug on a convicted prisoner is impermissible absent a finding of an overriding justification.[10]

When a defendant moves to terminate the administration of antipsychotic medication, the trial court violates the defendant's due process rights by requiring that the defendant come forward with a showing that the defendant could remain competent without medication.[11]

CUMULATIVE SUPPLEMENT

Cases:

Prison officials may override a prisoner's liberty interest in refusing unwanted medical treatment under the due process clause when treatment is reasonably related to legitimate penological interests; this is true even when the constitutional right claimed to have been infringed is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review. U.S. Const. Amend. 14. King v. Rubenstein, 825 F.3d 206 (4th Cir. 2016).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Westlake v. Lucas, 537 F.2d 857 (6th Cir. 1976).
Right to adequate medical care
(1) A prisoner is entitled to adequate medical care under the Eighth Amendment prohibition against cruel and unusual punishment, as well as under the Due Process Clause of the Fourteenth Amendment.
S.D.—Robinson v. Solem, 432 N.W.2d 246 (S.D. 1988).
(2) While a convicted prisoner's claim alleging inadequate medical care is brought under the Eighth Amendment, a pretrial detainee's claim alleging inadequate medical care is a due process claim; however, the claims generally are analyzed in the same manner.
Neb.—Rush v. Wilder, 263 Neb. 910, 644 N.W.2d 151 (2002).

2 U.S.—Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977); Shannon v. Lester, 519 F.2d 76 (6th Cir. 1975); Frazier v. Wilson, 450 F. Supp. 11 (E.D. Tenn. 1977).

3 U.S.—Newman v. State of Ala., 503 F.2d 1320 (5th Cir. 1974); Lightfoot v. Walker, 486 F. Supp. 504 (S.D. Ill. 1980).
Inadequate screening
A prison's failure to adequately screen newly arrived inmates for communicable diseases constituted "punishment" in violation of the Due Process Clause.
U.S.—Lareau v. Manson, 651 F.2d 96 (2d Cir. 1981).
Medical mistreatment

Medical mistreatment violates the due process guaranty only under exceptional circumstances that approach failure to provide care at all.

U.S.—Shields v. Kunkel, 442 F.2d 409 (9th Cir. 1971).

4 U.S.—McGee v. Adams, 721 F.3d 474 (7th Cir. 2013); Adekoya v. Holder, 751 F. Supp. 2d 688 (S.D. N.Y. 2010).

Standard for determining deliberate indifference

The standard for determining a prison official's deliberate indifference to serious medical needs in violation of the Eighth and Fourteenth Amendments includes both a subjective component and an objective component; subjectively, the official charged with deliberate indifference must act with a sufficiently culpable state of mind, while the objective component requires that the alleged deprivation be sufficiently serious, in the sense that a condition of urgency, one that may produce death, degeneration, or extreme pain, exists.

U.S.—Vogelfang v. Capra, 889 F. Supp. 2d 489 (S.D. N.Y. 2012).

5 U.S.—Mann v. Taser Intern., Inc., 588 F.3d 1291 (11th Cir. 2009).

6 U.S.—Alston v. Bendheim, 672 F. Supp. 2d 378 (S.D. N.Y. 2009).

7 U.S.—White v. Napoleon, 897 F.2d 103 (3d Cir. 1990).

Forced feeding of inmate

Assuming that forced feeding of an inmate by nasogastric tube during a hunger strike impinged on a due process right, forced feeding reasonably related to legitimate penological interests and therefore was valid; the State had a significant interest in preserving the inmate's life and preventing suicidal acts, and a hunger strike could have a significant destabilizing impact on the prison.

N.Y.—Bezio v. Dorsey, 21 N.Y.3d 93, 967 N.Y.S.2d 660, 989 N.E.2d 942 (2013).

Prisoner with tuberculosis

The prison officials' alleged conduct in forcing a prisoner to take medication for his diagnosed tuberculosis did not violate the prisoner's due-process liberty interest in rejecting unwanted medical treatment as such medication was necessary to further the prison's strong penological interest in responding to the threat of contagious disease.

U.S.—Cummings v. Ellsworth Correctional Facility, 511 Fed. Appx. 808 (10th Cir. 2013).

8 U.S.—Green v. Dormire, 691 F.3d 917 (8th Cir. 2012); U.S. v. Hardy, 878 F. Supp. 2d 373 (E.D. N.Y. 2012), aff'd, 724 F.3d 280 (2d Cir. 2013).

9 U.S.—Riggins v. Nevada, 504 U.S. 127, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992); Green v. Dormire, 691 F.3d 917 (8th Cir. 2012).

Administrative hearing comporting with due process

Administrative hearing procedures set by a state prison policy concerning the treatment of mentally ill prisoners with antipsychotic drugs against their will comported with the requirements of procedural due process, even though review was by an administrative panel consisting of a correctional official and medical professionals, as opposed to a judicial decision maker, where, after a psychiatrist made the decision that a prisoner should be treated with antipsychotic drugs, the administrative panel could review that decision and had to determine whether the prisoner suffered from a mental disorder and whether, as result of that disorder, the prisoner was dangerous to him- or herself, to others, or to their property, and where no member of the administrative panel could be involved in the prisoner's current treatment or diagnosis and the prisoner could be assisted by an independent lay advisor, although not by counsel; requiring a judicial hearing could divert scarce prison resources from the care and treatment of prisoners.

U.S.—Washington v. Harper, 494 U.S. 210, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990).

10 U.S.—Riggins v. Nevada, 504 U.S. 127, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992).

11 Idaho—State v. Odiaga, 125 Idaho 384, 871 P.2d 801 (1994).

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§ 1769. Classification of prisoners

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4824

Inmates have no procedural due process protection from routine classification decisions, and a state prisoner has no constitutionally protected liberty or other interest in a prisoner classification, in the absence of a right created by state statute.

Inmates have no procedural due process protection from routine classification decisions,[1] and absent a statutory right created by state law, a state prisoner has no constitutionally protected liberty or other interest in a particular prisoner classification.[2] Thus, the decisions of prison authorities relating to the classification of prisoners ordinarily are completely administrative matters regarding which the inmate has no due process rights beyond the expectation of a fair and impartial allocation of the resources of the prison system to its charges.[3] However, a protectable liberty interest in a custody classification status may be created where a statute or regulatory scheme provides a legitimate expectation in a particular classification.[4]

Changes in classification.

Due process may not be constitutionally mandated when prison authorities change a prisoner's classification,[5] and the loss of certain benefits by reason of reclassification is not sufficient to invoke due process procedures.[6] On the other hand, a prisoner must be afforded various due process guaranties if long-term changes in the prisoner's security classification are to result.[7] Accordingly, when a prisoner demonstrates extraordinary circumstances, or an atypical and significant hardship, the prisoner may maintain a due process challenge to a change in the prisoner's custodial classification.[8]

Footnotes

1 U.S.—Persechini v. Callaway, 651 F.3d 802 (8th Cir. 2011).

Conn.—Fuller v. Commissioner of Correction, 144 Conn. App. 375, 71 A.3d 689 (2013), certification denied, 310 Conn. 946, 80 A.3d 907 (2013).

Classifying prisoner as sex offender

Although a state prisoner alleged that he was defamed by the stigmatizing effect of his assigned sex offense treatment needs (SOTN) score for a conviction, pending charge, or known history of sexual offenses involving physical contact, even though he was acquitted on the sexual assault charge, the prisoner's alleged misclassification as a sex offender was not sufficient for a stigma-plus claim of deprivation of a liberty interest protected by due process, since the prisoner's allegedly stigmatizing SOTN score was not false, but rather, his underlying conduct for a conviction of two counts of assault, by cutting off the victim's nipple and forcing her to swallow it, warranted the SOTN score for a sexual offense involving physical conduct.

U.S.—Vega v. Lantz, 596 F.3d 77 (2d Cir. 2010).

2 Colo.—Kopec v. Clements, 271 P.3d 607 (Colo. App. 2011).

Security classification

(1) Prison officials' declining to decrease a prisoner's medium security classification, after a reclassification team recommended work-release and prerelease status, did not violate the prisoner's right to due process; the prisoner did not have a vested right to obtain a reduction in security status, in that prison officials were granted discretion by a directive of the department of correction in approving classification recommendations.

Md.—Campbell v. Cushwa, 133 Md. App. 519, 758 A.2d 616 (2000).

(2) Under state law, state prisoners have no right to be assigned a particular security classification, and the decision to change the security classification of prisoners who have served two years is solely within the discretion of the department of corrections; thus, any expectation that an inmate may have in being considered for a lower security clearance is too insubstantial to rise to the level of a liberty interest permitting a due process challenge to a department regulation providing that inmates serving a life sentence are eligible for consideration for minimum security assignment after six years from the date of admission.

U.S.—Kincaid v. Duckworth, 689 F.2d 702 (7th Cir. 1982).

3 U.S.—Sowell v. Israel, 500 F. Supp. 209 (E.D. Wis. 1980).

Alaska—McGinnis v. Stevens, 543 P.2d 1221 (Alaska 1975).

4 Idaho—Wolfe v. State, 114 Idaho 659, 759 P.2d 950 (Ct. App. 1988).

Right to hearing

(1) Language in the Department of Corrections' Classification Manual requiring a due process hearing before an inmate's participation in a work-release program could be terminated prevented the Department from arbitrarily removing an inmate from the program and thus created a liberty interest in an inmate's continued participation in the work-release program.

Ala.—Ex parte Berry, 794 So. 2d 307 (Ala. 2000).

(2) Where the state prison administration, pursuant to statutory authorization, had adopted regulations which provided that inmates would not be confined in maximum security for more than 30 days without a classification hearing, an inmate was deprived of a state-created liberty interest when he was not accorded a classification hearing within 30 days of his administrative segregation to maximum security.

U.S.—Lavine v. Wright, 423 F. Supp. 357 (D. Utah 1976).

As to due process requisites and sufficiency in prisoner disciplinary procedures, generally, see §§ 1771 to 1776.

5 Ind.—Dunn v. Jenkins, 268 Ind. 478, 377 N.E.2d 868 (1978).

N.C.—Goble v. Bounds, 13 N.C. App. 579, 186 S.E.2d 638 (1972).

No violation in absence of arbitrariness or caprice

Even if prison officials deviated from the guidelines when declining to decrease a prisoner's medium-security classification, the prisoner did not state a claim under 42 U.S.C.A. § 1983 for an alleged violation of his right to due process; the deviation from the rules did not necessarily amount to a constitutional violation provided that the rules of prison management were necessary or reasonable concomitants of imprisonment and were not exercised in such a manner to constitute clear arbitrariness or caprice.

Md.—Campbell v. Cushwa, 133 Md. App. 519, 758 A.2d 616 (2000).

Removal from "house arrest" program

An inmate who was removed from a "house arrest" program and placed in the general prison population because of alleged rule violations did not have a liberty interest, protected by due process, in his inmate classification.

Miss.—Edwards v. Booker, 796 So. 2d 991 (Miss. 2001).

6 U.S.—Gardner v. Benton, 452 F. Supp. 170 (E.D. Okla. 1977).

7 U.S.—Patterson v. Riddle, 407 F. Supp. 1035 (E.D. Va. 1976), aff'd, 556 F.2d 574 (4th Cir. 1977).

As to due process in connection with changes in conditions of confinement, generally, see § 1767.

As to due process with respect to a transfer from one institution to another, see § 1766.

8 U.S.—Wilkerson v. Goodwin, 774 F.3d 845 (5th Cir. 2014).

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16C C.J.S. Constitutional Law § 1770

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§ 1770. Administrative confinement or segregation of prisoner

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4826

Administrative segregation does not involve interests independently protected by the Due Process Clause, and solitary confinement and isolation of prisoners who are a threat to themselves or to the safety and security of others are not of themselves a denial of due process.

A prisoner does not have a due-process liberty interest in remaining among the general prison population.[1] Because prison officials have broad administrative and discretionary authority over the institutions they manage and a lawfully incarcerated person retains only a narrow range of protected liberty interests, administrative segregation does not involve interests independently protected by the Due Process Clause.[2] Indeed, administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration, and the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence.[3]

Discipline by prison officials in response to a wide range of misconduct falls within the expected parameters of a sentence imposed by a court of law, in determining whether such sanctions violate the due-process liberty interest.[4] Where a prison inmate is placed in segregated confinement, any attendant due-process liberty interest is limited to freedom from restraint which imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life, and whether such hardship exists is determined by examining both the degree and the duration of the restrictive confinement.[5] It is appropriate to compare conditions at issue with those ordinarily experienced by inmates with similar records and sentences.[6] Even extreme conditions in administrative segregation do not, on their own, constitute such hardship.[7] Apart from due process protections, prisoners retain protection from arbitrary state action even within expected conditions of confinement, and a prisoner may invoke the First and Eighth Amendments and the Equal Protection Clause of the Fourteenth Amendment where appropriate and may draw upon internal prison grievance procedures and state judicial review where available.[8]

The fact that an inmate has been deprived of a protected liberty interest, such as retention of earned good-time credits and the right to remain in the general prison population rather than being placed in segregation, does not mean that the inmate's constitutional rights have been violated because the Due Process Clause protects only those deprivations which occur without due process of law.[9] Where a protected liberty interest has been acquired, an informal, nonadversary evidentiary review is sufficient for the decision to confine an inmate to administrative segregation.[10] In such a case, an inmate must merely receive some notice of the charges and an opportunity to present the inmate's views to the prison official charged with deciding whether to transfer the inmate to administrative segregation.[11]

Prison officials must engage in some sort of periodic review of confinement of inmates in segregated confinement in order to satisfy due process.[12] A meaningful review for a prisoner in a behavior-modification program is one that evaluates the prisoner's current circumstances and future prospects and, considering the reasons for the prisoner's confinement to the program, determines whether that placement remains warranted.[13] In the context of a stratified incentive program, the review would consider whether the prisoner is eligible to move to the next level or, if the prisoner already is at the highest level, whether the prisoner is eligible to graduate from the program.[14]

Effect of statutes and regulations mandating procedure.

The mere fact that a state creates a careful procedural structure to regulate the use of administrative segregation does not indicate the existence of a protected liberty interest.[15] On the other hand, where state statutes and regulations setting forth the procedure for confining an inmate to administrative segregation are mandatory in nature, the inmate acquires a protected liberty interest in remaining in the general prison population to which due process protection is attached.[16] For example, where an adjustment and program segregation can only be imposed for major violations, and where administrative regulations utilize mandatory language to describe the process which must be accorded prisoners, an inmate has a liberty interest in remaining in the general prison population and free from adjustment or program segregation.[17]

Solitary or isolated confinement.

In general, solitary confinement and isolation of prisoners who are a threat to themselves or to the safety and security of others are not of themselves a denial of due process.[18] However, solitary pretrial and prehearing confinement of an inmate is in violation of the inmate's right to due process insofar as it is punitive in nature.[19]

In order to afford a due process hearing with respect to a decision to place or retain a prisoner in a solitary confinement classification and return the prisoner to a security housing unit with attendant restrictions on contact visits and other privileges, the prisoner may be entitled to a written notice of the reasons or the decision, a fair hearing before one or more prison officials,

representation by counsel-substitute where deemed necessary, an opportunity to present witnesses and documentary evidence unless unduly hazardous to institutional safety or correctional goals, and a written decision including references to the evidence relied upon and the reasons for such confinement.[20]

CUMULATIVE SUPPLEMENT

Cases:

Inmate failed to adequately allege that he suffered an atypical and significant hardship sufficient to implicate a liberty interest when he was placed in prison's special housing unit for three months as a result of disciplinary hearing, as required to state § 1983 claim against prison officials for denial of due process; prisoner's allegations that he could not participate in various educational, vocational, rehabilitative or self-help programs while in the unit, and thus was unable to work towards a conditional release, were speculative and did not establish the existence of a protected liberty interest. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983. Nieves v. Prack, 172 F. Supp. 3d 647 (W.D. N.Y. 2016).

Inmate who alleged that his confinement in segregated housing unit (SHU) amounted to an atypical and significant hardship because he did not speak English and was denied access to legal materials in Spanish, was denied access to the law library, and was denied medical care adequately alleged a protected liberty interest to state a § 1983 due process claim. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983. Montalvo v. Lamy, 139 F. Supp. 3d 597 (W.D. N.Y. 2015).

Placement of county jail inmate convicted of failure to pay child support in administrative segregation did not violate inmate's due process rights, where inmate had amassed a significant disciplinary record during prior stints at jail, including being found guilty of damage to county property, throwing objects, and simple assault, as well as acting in an aggressive fashion toward staff and inmates, and there was not showing that the conditions significantly more restrictive than those imposed in relation to ordinary incidents of incarceration. U.S. Const. Amend. 14. Gayle v. Harmon, 207 F. Supp. 3d 549 (E.D. Pa. 2016).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Burgos v. Canino, 641 F. Supp. 2d 443 (E.D. Pa. 2009), aff'd, 358 Fed. Appx. 302 (3d Cir. 2009).

2 U.S.—Hewitt v. Helms, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983).
Wash.—In re Lain, 179 Wash. 2d 1, 315 P.3d 455 (2013).
Segregation motivated by administrative and punitive considerations
Where confinement is motivated by both administrative and punitive considerations, due process is not required if the confinement would have taken place even in the absence of punitive considerations.
U.S.—Sher v. Coughlin, 739 F.2d 77 (2d Cir. 1984).
As to due process in connection with conditions of confinement, generally, see § 1767.

3 U.S.—Hewitt v. Helms, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983); Rezaq v. Nalley, 677 F.3d 1001 (10th Cir. 2012).
Protective custody
Suspension of certain benefits and opportunities represented an accommodation with the institutional interest in providing adequate protection to protective custody inmates.
U.S.—Crozier v. Shillinger, 710 F. Supp. 760 (D. Wyo. 1989).
As to due process in connection with the transfer of a prisoner from one institution to another, generally, see § 1766.

4 U.S.—Sandin v. Conner, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995).
Segregation due to gang affiliation

Placement of a state prison inmate in administrative segregation because of his gang affiliation did not deprive the inmate of a constitutionally cognizable liberty interest.

U.S.—Pichardo v. Kinker, 73 F.3d 612 (5th Cir. 1996).

5 U.S.—Sandin v. Conner, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995); Williams v. Hobbs, 662 F.3d 994 (8th Cir. 2011).

Mass.—LaChance v. Commissioner of Correction, 463 Mass. 767, 978 N.E.2d 1199, 96 A.L.R.6th 731 (2012).

6 U.S.—Rezaq v. Nalley, 677 F.3d 1001 (10th Cir. 2012).

7 U.S.—Rezaq v. Nalley, 677 F.3d 1001 (10th Cir. 2012).

8 U.S.—Sandin v. Conner, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995).

As to equal protection with respect to confinement of prisoners, generally, see § 1358.

9 Wis.—Irby v. Macht, 184 Wis. 2d 831, 522 N.W.2d 9 (1994).

10 U.S.—Hewitt v. Helms, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983).

11 U.S.—Hewitt v. Helms, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983).

12 U.S.—Toevs v. Reid, 685 F.3d 903 (10th Cir. 2012); Payne v. Friel, 919 F. Supp. 2d 1185 (D. Utah 2013), appeal dismissed, 10th Circ. (13-4019) (June 18, 2013).

13 U.S.—Toevs v. Reid, 685 F.3d 903 (10th Cir. 2012).

14 U.S.—Toevs v. Reid, 685 F.3d 903 (10th Cir. 2012).

15 U.S.—Hewitt v. Helms, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983).

16 U.S.—Hewitt v. Helms, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983).

Statute providing for review hearing

A statute providing that there "shall" be a review hearing for each offender detained in administrative segregation, 30 days after the initial period of confinement and every 90 days thereafter, conferred an interest on a prisoner sufficient to permit assertion of a claim that detention without review violated the prisoner's due process rights.

Mo.—State ex rel. Haley v. Groose, 873 S.W.2d 221 (Mo. 1994).

Particular regulations or practice

(1) State prison regulations created an expectation in inmates that they would not be confined in administrative segregation unless certain conditions existed, and this liberty interest was protected against arbitrary deprivation by the Due Process Clause.

U.S.—Finney v. Mabry, 528 F. Supp. 567 (E.D. Ark. 1981).

(2) Where the practice at a state maximum security prison was to commit individual prisoners to administrative segregation only in the event of a severe disciplinary infraction, the reasonable expectation of prisoners in the general population, particularly those whose conduct had been exemplary, that they would not be confined indiscriminately constituted "liberty" entitled to Fourteenth Amendment due process protection.

U.S.—Saunders v. Packel, 436 F. Supp. 618 (E.D. Pa. 1977).

17 Wis.—Irby v. Macht, 184 Wis. 2d 831, 522 N.W.2d 9 (1994).

18 U.S.—O'Bryan v. Saginaw County, Mich., 437 F. Supp. 582 (E.D. Mich. 1977), judgment entered, 446 F. Supp. 436 (E.D. Mich. 1978).

19 U.S.—Kelly v. Brewer, 378 F. Supp. 447 (S.D. Iowa 1974).

As to due process in connection with punitive solitary confinement, see § 1772.

20 Cal.—In re Carr, 116 Cal. App. 3d 962, 172 Cal. Rptr. 417 (1st Dist. 1981).

As to due process in connection with prisoner classifications, generally, see § 1769.

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16C C.J.S. Constitutional Law § 1771

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Constitutional Law
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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

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J. Judgment, Sentence, and Punishment; Appeal and Error

3. Execution of Sentence; Prisons and Prisoners

c. Discipline or Punishment

§ 1771. Prisoner's discipline or punishment, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4824

Inmates have due process rights in prison disciplinary hearings, and the test for gauging a prisoner's claim to a due process-mandated administrative hearing that precedes the imposition of disciplinary sanctions is whether the prisoner's liberty or property interest is in fact threatened with invasion.

Inmates have due process rights in prison disciplinary hearings,[1] but the liberty interest of a duly convicted inmate, for purposes of a due process challenge to a disciplinary proceeding, is minimal.[2] Minimum due process in prison disciplinary cases means that the prisoner must receive notice of the alleged violation, be provided an opportunity to present documentary evidence and call witnesses when not unduly hazardous to institutional safety and correctional goals, and receive a written statement of the evidence relied upon and the reasons for the disciplinary action.[3] However, even though the procedures may provide adequate notice and an opportunity to be heard, an administrative decision in a disciplinary case may still be overturned as violative of due process if it is arbitrary and capricious.[4]

In general, the test for gauging a prisoner's claim to a due process-mandated administrative hearing that precedes the imposition of disciplinary sanctions is whether the prisoner's liberty or property interest is in fact threatened with invasion.[5] In determining whether minimum due process is required in prison disciplinary proceedings, an additional test is the severity of the potential punishment and not the actual punishment.[6]

Even when prison practice has a security purpose and is the result of informed decisionmaking by prison officials, there is a further constitutional requirement that the practice not be an exaggerated response to institutional needs.[7] If it is an exaggerated response, then it constitutes punishment and falls within the scope of the Due Process Clause.[8]

Once the necessity for the application of force against an inmate ceases, any continued use of harmful force can be a violation of the Eighth and Fourteenth Amendments, and any abuse directed at a prisoner after the prisoner terminates any resistance to authority is an Eighth Amendment violation.[9]

Exigent circumstances.

Exigent circumstances may justify temporary suspension of the due process procedures applicable to prison disciplinary actions.[10] However, after the emergency has ended, the due process safeguards must be provided as soon as possible.[11]

Effect of subsequent acquittal.

Notions of fundamental fairness embodied in the Due Process Clause are not violated by permitting a federal prison to discipline an inmate for a violation of prison rules where the prisoner is subsequently acquitted on criminal charges stemming from the same incident.[12]

Necessity and sufficiency of written rules.

The Due Process Clause proscribes any serious disciplinary sanctions against a prison inmate unless the inmate is found to have violated written rules which are adequately promulgated prior to the commission of the infraction charged[13] and which describe punishable conduct with reasonable precision.[14]

CUMULATIVE SUPPLEMENT

Cases:

Any procedural error arising from disciplinary hearing officer's modification of charge against federal inmate, without providing inmate advance written notice of modification, was corrected through administrative appeal process, and inmate ultimately did not lose any good time credits, and thus inmate's due process rights were not violated in connection with disciplinary hearing. U.S.C.A. Const.Amend. 5. Frank v. Schultz, 808 F.3d 762 (9th Cir. 2015), for additional opinion, see, 2015 WL 8612402 (9th Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Brown v. Oregon Dept. of Corrections, 751 F.3d 983 (9th Cir. 2014); Richard v. Fischer, 38 F. Supp. 3d 340 (W.D. N.Y. 2014).
Alaska—James v. State, Dept. of Corrections, 260 P.3d 1046 (Alaska 2011).
Kan.—Swafford v. McKune, 46 Kan. App. 2d 325, 263 P.3d 791 (2011).

2 Mont.—Jellison v. Mahoney, 1999 MT 217, 295 Mont. 540, 986 P.2d 1089 (1999).
Two-part test for violation of procedural due process
A two-part test requires an individual claiming a violation of procedural due process to establish what procedural protections are necessary to ensure that the decision to deprive the individual of the protected interest is neither arbitrary nor erroneous and that the state procedures accompanying the alleged deprivation failed to comport with this standard.
U.S.—Washington v. Harper, 494 U.S. 210, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990).

3 Wash.—In re Personal Restraint of Gronquist, 138 Wash. 2d 388, 978 P.2d 1083 (1999).

4 U.S.—Covington v. Sielaff, 430 F. Supp. 562 (N.D. Ill. 1977).

5 Okla.—Prock v. District Court of Pittsburg County, 1981 OK 41, 630 P.2d 772 (Okla. 1981).

6 U.S.—Ward v. Johnson, 667 F.2d 1126 (4th Cir. 1981), on reh'g, 690 F.2d 1098 (4th Cir. 1982).

7 U.S.—Beckett v. Powers, 494 F. Supp. 364 (W.D. Wis. 1980).
Macing in violation of regulations
Even if state prison regulations governing the use of mace create a liberty interest in not being maced, evidence that the inmate was maced in violation of the regulations was not sufficient, by itself, to establish a violation of procedural due process.
U.S.—Colon v. Schneider, 899 F.2d 660 (7th Cir. 1990).

8 U.S.—Beckett v. Powers, 494 F. Supp. 364 (W.D. Wis. 1980).

9 U.S.—Williams v. Burton, 943 F.2d 1572 (11th Cir. 1991).

10 U.S.—Morris v. Travisono, 509 F.2d 1358 (1st Cir. 1975).
Disciplinary tranfers
In an emergency situation calling for immediate action, disciplinary transfers would not necessarily need to be preceded by the requisite due process procedures as long as they were afforded to the inmate as soon as possible after the emergency transfer.
U.S.—U. S. ex rel. Gereau v. Henderson, 526 F.2d 889 (5th Cir. 1976).
As to the process due prisoners in emergencies, generally, see § 1760.
As to what process is due in connection with disciplinary transfers, generally, see § 1774.
As to due process in connection with the transfer of a prisoner from one institution to another, generally, see § 1766.

11 U.S.—Morris v. Travisono, 509 F.2d 1358 (1st Cir. 1975).

12 U.S.—Rusher v. Arnold, 550 F.2d 896 (3d Cir. 1977).

13 U.S.—Battle v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974), judgment aff'd in part, rev'd in part on other grounds, 993 F.2d 1551 (10th Cir. 1993).
N.Y.—Bones v. Warden, New York City Correctional Institution for Men, 77 Misc. 2d 617, 352 N.Y.S.2d 119 (Sup 1974).

14 U.S.—Battle v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974), judgment aff'd in part, rev'd in part on other grounds, 993 F.2d 1551 (10th Cir. 1993).
Degree of specificity
Due process requires certain minimal standards of specificity in prison regulations, but the degree of specificity required is not as strict in every instance as that required of ordinary criminal sanctions.
U.S.—Meyers v. Aldredge, 492 F.2d 296 (3d Cir. 1974).
Standard of behavior
Due process required, as a minimum, that notice of the standard of behavior expected be given to the inmates of a disciplinary cellblock wing.
U.S.—Hardwick v. Ault, 447 F. Supp. 116 (M.D. Ga. 1978).

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16C C.J.S. Constitutional Law § 1772

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

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§ 1772. Prisoner's confinement or segregation

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4824, 4826

Prison disciplinary proceedings involving assignment to segregation generally implicate a liberty protected by the Fourteenth Amendment.

Differences in nomenclature among the various forms of punitive or disciplinary confinement imposed in prison disciplinary proceedings should not be dispositive in determining whether minimal due process is required.[1] Prison disciplinary proceedings involving assignment to segregation generally implicate a deprivation of liberty within the scope of the protection afforded by the Fourteenth Amendment.[2] Thus, a prisoner ordinarily cannot be placed in punitive confinement,[3] or disciplinary or punitive segregation,[4] or in administrative segregation akin to punishment,[5] or, more particularly, in punitive solitary confinement,[6] unless the procedures employed by the prison officials comport with minimum due process standards.

However, an inmate's due-process liberty interest in avoiding segregation is limited.[7] A prisoner does not establish a state-created liberty interest in avoiding disciplinary segregated confinement if such confinement does not present a dramatic departure from

the basic conditions of the inmate's indeterminate sentence.[8] In determining whether a prison inmate suffered a deprivation of a due-process protected liberty interest as a result of a disciplinary sanction, the court considers: (1) whether the challenged condition mirrored those conditions imposed upon inmates in administrative segregation and protective custody, and thus comported with the prison's discretionary authority; (2) the duration of the condition, and the degree of restraint imposed; and (3) whether the State's action will invariably affect the duration of the inmate's sentence.[9]

CUMULATIVE SUPPLEMENT

Cases:

While inmate may maintain due process challenge to custodial reclassification that results in transfer to lockdown, prisoner must demonstrate extraordinary circumstances by showing that change in classification imposes atypical and significant hardship on inmate in relation to ordinary incidents of prison life. U.S. Const. Amend. 14. Alexander v. Texas Department of Criminal Justice, 951 F.3d 236 (5th Cir. 2020).

State inmate failed to establish that placement in prison's punitive segregation unit violated a protected liberty interest, and thus failed to state claim against prison employees for violation of due process; although inmate argued that placing him in unit had adverse effect on his parole eligibility, Georgia parole system did not create a liberty interest protected by the due process clause because, in Georgia, there was no legitimate expectation of parole, and inmate failed to show that placement affected the duration of his sentence. U.S. Const. Amend. 14. Delgiudice v. Primus, 679 Fed. Appx. 944 (11th Cir. 2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—McKinnon v. Patterson, 568 F.2d 930 (2d Cir. 1977).
Denomination as administrative; protective custody
(1) The fact that a reassignment of prisoners to a different wing of the same prison was denominated an administrative reclassification, rather than a punitive transfer, was of no moment in determining inmates' due process rights where the impact on the inmate was the same.
U.S.—Carlo v. Gunter, 520 F.2d 1293 (1st Cir. 1975).
(2) Due process standards must be followed when a "lock-up" imposed on a prisoner is tantamount to "solitary confinement" or "keep-safe" or when the "lock-up" looks and feels like either even though denominated "administrative segregation."
U.S.—Vice v. Harvey, 458 F. Supp. 1031 (D.S.C. 1978).
(3) Inmates who at first refused to consent to being placed in protective custody; who were then immediately clapped into handcuffs and placed in "protective custody"; who were then served with documents, evidently drafted for use in disciplinary proceedings, on which the words "protective custody" had been typed in; who were treated as though they were troublemakers responsible for alleged unsettled conditions in their dormitory corridor; and who were kept under conditions indistinguishable from punitive segregation were denied due process.
U.S.—Taylor v. Clement, 433 F. Supp. 585 (S.D. N.Y. 1977).

2 U.S.—Harris v. MacDonald, 532 F. Supp. 36 (N.D. Ill. 1982).

3 U.S.—Maxton v. Johnson, 488 F. Supp. 1030 (D.S.C. 1980).
Isolation cell
(1) Use of an isolation cell is a serious sanction surrounded by due process safeguards.
U.S.—Negron v. Preiser, 382 F. Supp. 535 (S.D. N.Y. 1974).

(2) An inmate in a county jail did not have a constitutional right to a full panoply of protections before being sent to an isolation cell but was entitled to at least the minimal safeguards afforded by due process of law.
N.Y.—Wilkinson v. Skinner, 34 N.Y.2d 53, 356 N.Y.S.2d 15, 312 N.E.2d 158 (1974).

4 Alaska—Barber v. State, Dept. of Corrections, 314 P.3d 58 (Alaska 2013).

Modicum of due process required

A prisoner may not be subjected to punitive segregation without at least a modicum of due process.
U.S.—Taylor v. Clement, 433 F. Supp. 585 (S.D. N.Y. 1977).

Necessity of evidentiary basis

Prison officials are barred by due process from segregating prisoners for infractions without some evidentiary basis.
U.S.—Joyner v. McClellan, 396 F. Supp. 912 (D. Md. 1975).

Hearing within reasonable time required

The immediate transfer of an inmate to disciplinary segregation, where the security and welfare of the facility staff or inmates might be impaired by allowing the inmate to remain in regular housing, did not violate due process requirements provided that a hearing was held within a reasonable time.
Cal.—Inmates of Sybil Brand Institute for Women v. County of Los Angeles, 130 Cal. App. 3d 89, 181 Cal. Rptr. 599 (2d Dist. 1982).

5 U.S.—Dawson v. Kendrick, 527 F. Supp. 1252 (S.D. W. Va. 1981).

6 U.S.—Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).
N.Y.—Ortiz v. Ward, 87 Misc. 2d 307, 384 N.Y.S.2d 960 (Sup 1976).

Exigent situation

Given the exigency of the situation during and after a prison riot and the need for further investigation of the riot and a charge against one inmate for inciting riot, failure to afford the inmate a hearing prior to his transfer to the isolation section did not offend due process, but the keeping of the prison inmate in solitary confinement without giving him an opportunity to rebut the charges for which he was confined in isolation was a violation of the Due Process Clause.
U.S.—Pitts v. Kee, 511 F. Supp. 497 (D. Del. 1981).

As to the process due a prisoner in an emergency, generally, see § 1760.

As to what process is due in prison disciplinary proceedings, generally, see § 1774.

As to due process in connection with the transfer of a prisoner from one institution to another, generally, see § 1766.

7 U.S.—Hardaway v. Meyerhoff, 734 F.3d 740 (7th Cir. 2013).

8 U.S.—Prieto v. Clarke, 780 F.3d 245 (4th Cir. 2015).

9 **27-month confinement in intensive management unit**

A state prison inmate's 27-month confinement in an intensive management unit deprived him of a due-process protected liberty interest, where the inmate received no meaningful review of his confinement and experienced atypical and significant hardship in that he was subjected to solitary confinement for over 23 hours each day, with almost no interpersonal contact, and he was denied most privileges afforded inmates in the general population.
U.S.—Brown v. Oregon Dept. of Corrections, 751 F.3d 983 (9th Cir. 2014).

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16C C.J.S. Constitutional Law § 1773

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Constitutional Law
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c. Discipline or Punishment

§ 1773. Prisoner's loss of good time

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4829

Where the State creates a right to good time and recognizes that its deprivation is a sanction authorized for major misconduct, a prisoner's interest therein is sufficiently embraced within the liberty interest protected by the Fourteenth Amendment to entitle the prisoner to those minimum procedural safeguards appropriate under the circumstances and required by the Due Process Clause in order to insure that the state-created right is not arbitrarily abrogated.

Where the State creates a right to good time and recognizes that its deprivation is a sanction authorized for major misconduct,[1] a prisoner's interest therein is sufficiently embraced within the liberty interest protected by the Fourteenth Amendment.[2] On the other hand, failure to award an inmate meritorious earned-time credit for participation in a rehabilitation programs is not violative of the inmate's federal and state constitutional rights where the inmate's earning of such "time" is a matter of grace or privilege and is within the discretionary power of correctional officials.[3] In any event, an inmate only acquires a liberty interest in good-time credits when they are actually awarded.[4]

Where due process of law attaches to a good-time credit that an inmate earns pursuant to state law, certain minimal due process procedures must be followed before good time may be revoked[5] so as to insure that the state-created right is not arbitrarily abrogated.[6] In this regard, revocation of good-time credits does not comport with due process unless the findings of the prison disciplinary board are supported by some evidence in the record.[7] However, the requirements to meet due process as to good-time credits are different from the requirements relating to the revocation of parole and probation.[8] Thus, certain traditional due process rights,[9] such as the right to confront adverse witnesses[10] and the right to counsel,[11] have not been mandated.

Publication of regulations and rules.

Where there is a state-created liberty interest in prisoners' receipt of good-time credits,[12] due process requires that the regulations or rules of conduct affecting the right to good time be published.[13]

CUMULATIVE SUPPLEMENT

Cases:

Due process requirement that inmate have opportunity to call witnesses and present documentary evidence in his defense was satisfied, in disciplinary proceeding in which inmate was charged with committing prohibited act of escape and return and faced loss of good time credits; inmate presented no documentary evidence at hearing and did not contend he was not permitted to present documentary evidence at hearing, and inmate chose to go forward with hearing and waived right to witnesses because disciplinary hearing officer had not noticed his request for witnesses and inmate did not wish to reschedule hearing. U.S. Const. Amend. 5. Soto v. Williams, 471 F. Supp. 3d 822 (N.D. Ohio 2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); Kozlowski v. Coughlin, 539 F. Supp. 852 (S.D. N.Y. 1982).
A.L.R. Library
Withdrawal, forfeiture, modification, or denial of good-time allowance to prisoner, 95 A.L.R.2d 1265.

2 U.S.—Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); Pugliese v. Nelson, 617 F.2d 916 (2d Cir. 1980); Harris v. MacDonald, 532 F. Supp. 36 (N.D. Ill. 1982).
Iowa—Maghee v. Iowa Dist. Court Judge, Reade, 712 N.W.2d 687 (Iowa 2006).
Ky.—White v. Boards-Bey, 426 S.W.3d 569 (Ky. 2014).
Protected due-process liberty interest created
The good-time allowance statute created a protected due-process liberty interest in good time for inmates.
Mont.—McDermott v. Montana Dept. of Corrections, 2001 MT 134, 305 Mont. 462, 29 P.3d 992 (2001).
No liberty interest in restoration of credits
Even if committees had in the past consistently recommended restoration of forfeited good-conduct-time credits to eligible inmates, and the Bureau of State Classification and Records had invariably followed those recommendations, such a process would not create a liberty interest subject to a procedural due process analysis.
Tex.—Ex parte Montgomery, 894 S.W.2d 324 (Tex. Crim. App. 1995).

3 Miss.—Ross v. State, 584 So. 2d 777 (Miss. 1991).

4 Ind.—Bleeke v. Lemmon, 6 N.E.3d 907 (Ind. 2014).

5 U.S.—Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); Eichwedel v. Chandler, 696 F.3d 660 (7th Cir. 2012), opinion after certified question answered, 700 F.3d 275 (7th Cir. 2012).
Ala.—Bryant v. Alabama Dept. of Corrections, 61 So. 3d 1109 (Ala. Crim. App. 2010).
Ky.—Ramirez v. Nietzel, 424 S.W.3d 911 (Ky. 2014).
Reasonable expectation of credit entitled to protection
A reasonable expectation on the part of a prisoner that the prisoner will be able to earn a good-time credit is entitled to procedural due process protection.
Me.—Carlson v. Oliver, 372 A.2d 226 (Me. 1977).
Opportunity to refute accusation
A pro se complaint filed by a husband, a federal prison inmate, and his wife alleging that his good-time credits were withdrawn without an opportunity to refute a guard's accusations of an impropriety in the visiting room stated a claim on which relief could be granted under Fifth Amendment due process.
U.S.—Miller v. Stanmore, 636 F.2d 986 (5th Cir. 1981).
As to what process is due in prison disciplinary proceedings, generally, see § 1774.

6 U.S.—Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); Langton v. Berman, 667 F.2d 231 (1st Cir. 1981).
Ill.—Williams v. Irving, 98 Ill. App. 3d 323, 53 Ill. Dec. 746, 424 N.E.2d 381 (3d Dist. 1981).
Denial of federal trusty time against concurrent state sentence
A prisoner who was serving concurrent federal and state sentences in a federal institution was not entitled to a credit for trusty time on his state sentence, and the denial of the trusty time credit did not violate his due process rights.
Tex.—Ex parte Peel, 626 S.W.2d 767 (Tex. Crim. App. 1982).

7 U.S.—Denny v. Schultz, 708 F.3d 140 (3d Cir. 2013); Allen v. Clements, 930 F. Supp. 2d 1252 (D. Colo. 2013).
Discovery of weapons in common area
The record included some evidence that a prison staff member discovered weapons in the common area of a room for which two prisoners shared responsibility, and revocation of their good-time credits for possession of a weapon thus did not violate their due process rights, where the incident report reflected that the weapons were found inside a room they shared with six other inmates, above the entry door, and although the inmates said that the weapons were above the ceiling in an unauthorized area that they could not reach under prison rules, a staff member said that the weapons were found below the ceiling.
U.S.—Flowers v. Anderson, 661 F.3d 977 (8th Cir. 2011).

8 U.S.—U. S. ex rel. Myers v. Sielaff, 381 F. Supp. 840 (E.D. Pa. 1974).
Iowa—Maghee v. Iowa Dist. Court Judge, Reade, 712 N.W.2d 687 (Iowa 2006).
As to due process in connection with revocation of probation, generally, see § 1785.
As to due process in connection with revocation of parole, generally, see § 1792.

9 U.S.—King v. Wells, 94 F.R.D. 675 (E.D. Mich. 1982).

10 U.S.—Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); King v. Wells, 94 F.R.D. 675 (E.D. Mich. 1982).
As to the right of confrontation in connection with what process is due in prison disciplinary proceedings, generally, see § 1776.

11 U.S.—Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); King v. Wells, 94 F.R.D. 675 (E.D. Mich. 1982).
No right to counsel at disciplinary hearing
An inmate had no due process right to retained counsel at his disciplinary hearing for a violation even though a conviction would result in the withholding of 25% to 50% of his good-time credit for the program classification review period in which the violation or conviction occurred; the credits could be withheld because the inmate had not yet earned the credits by being violation-free for the review period.
Kan.—In re Pierpoint, 271 Kan. 620, 24 P.3d 128 (2001).
As to due process with respect to classifications of inmates, generally, see § 1769.
As to the right to counsel substitute or a lay advocate in disciplinary proceedings involving illiterate inmates or complex issues, see § 1774.

12 U.S.—Dawson v. Kendrick, 527 F. Supp. 1252 (S.D. W. Va. 1981).

13 U.S.—Dawson v. Kendrick, 527 F. Supp. 1252 (S.D. W. Va. 1981).

W. Va.—State ex rel. Gillespie v. Kendrick, 164 W. Va. 599, 265 S.E.2d 537 (1980).

As to due process in connection with rules governing punishable conduct in prison disciplinary proceedings, generally, see § 1771.

End of Document

16C C.J.S. Constitutional Law § 1774

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Constitutional Law
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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

3. Execution of Sentence; Prisons and Prisoners

c. Discipline or Punishment

§ 1774. What process is due in connection with prison discipline or punishment

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4824

Prison inmates generally are entitled to the minimum elements of due process in the imposition of prison discipline or punishment, and the minimum requirements of procedural due process appropriate for the circumstances must be observed in prison disciplinary proceedings.

Prison inmates generally are entitled to the minimum elements of due process in the imposition of prison discipline[1] or punishment,[2] and the minimum requirements of procedural due process appropriate for the circumstances must be observed in prison disciplinary proceedings.[3] The requirements of due process in such proceedings must be ascertained in light of the need for a mutual accommodation between institutional needs and objectives and the provisions of the constitution that are of general application.[4] However, in determining what is due process in the prison context, one cannot automatically apply procedural rules designed for free citizens in an open society to the very different situation presented by a disciplinary proceeding in a state prison.[5]

Thus, a prison inmate facing a disciplinary hearing is not entitled to the same level of due process as a criminal defendant,[6] since the full panoply of due process rights does not apply to the administration of prison discipline,[7] and in prison disciplinary proceedings, due process does not require a full-scale adversary hearing.[8] Nonetheless, when an inmate's constitutionally protected interests are at stake, the Due Process Clause requires a state prison's disciplinary proceedings to afford an inmate at least 24 hours' advance written notice of the claimed violation,[9] a written statement by the fact finders as to the evidence relied on and the reasons for the disciplinary action taken,[10] and the right to call witnesses and to present documentary evidence in defense when to do so would not be unduly hazardous to institutional safety or correctional goals.[11] An inmate's right to attend a prison disciplinary hearing also is one of the essential due process protections afforded by the Fourteenth Amendment.[12]

An inmate did not have a due process right to a copy of a tape recording of the inmate's disciplinary hearing.[13]

Presence of, or representation by, counsel.

In a prison disciplinary proceeding, due process generally does not require the presence of,[14] or representation by,[15] counsel. However, when an inmate is illiterate or the issues involved in a disciplinary hearing are complex, due process requires officials to provide an inmate with some form of counsel substitute.[16] In any event, an inmate's right to assistance falls far short of the right to counsel that the Sixth Amendment guarantees to criminal defendants.[17]

CUMULATIVE SUPPLEMENT

Cases:

State inmate's confinement in keeplock for two-month period after disciplinary hearing officer found him guilty of drug use did not give rise to liberty interest protected by substantive or procedural due process; although inmate lost certain privileges, and was confined to his cell 23 hours per day and placed in shackles whenever he was allowed to leave cell, there was no indication that such restrictions were anything other than typical concomitants of keeplock. U.S. Const. Amend. 14. Israel v. Bradt, 228 F. Supp. 3d 237 (W.D. N.Y. 2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Smith v. Sullivan, 553 F.2d 373 (5th Cir. 1977); Owen v. Heyne, 473 F. Supp. 345 (N.D. Ind. 1978), aff'd, 605 F.2d 559 (7th Cir. 1979).
Ky.—Haney v. Thomas, 406 S.W.3d 823 (Ky. 2013).

2 U.S.—Gray v. Creamer, 465 F.2d 179 (3d Cir. 1972).
W. Va.—Watson v. Whyte, 162 W. Va. 26, 245 S.E.2d 916 (1978).
Wis.—State ex rel. Irby v. Israel, 95 Wis. 2d 697, 291 N.W.2d 643 (Ct. App. 1980).
Cruel and unusual punishment
(1) The Eighth Amendment, which is applicable to the states through the Fourteenth Amendment, prohibits the infliction of cruel and unusual punishment on prisoners.
U.S.—Albers v. Whitley, 546 F. Supp. 726 (D. Or. 1982), judgment aff'd in part, rev'd in part on other grounds, 743 F.2d 1372 (9th Cir. 1984), judgment rev'd on other grounds, 475 U.S. 312, 106 S. Ct. 1078, 89 L. Ed. 2d 251 (1986).

(2) The Due Process Clause of the Fourteenth Amendment afforded no greater protection than did the Cruel and Unusual Punishment Clause of the Eighth Amendment to a prisoner who claimed that the deliberate use of force against him during the quelling of a prison riot was excessive and unjustified.

U.S.—Whitley v. Albers, 475 U.S. 312, 106 S. Ct. 1078, 89 L. Ed. 2d 251 (1986).

A.L.R. Library

Propriety and construction of "totality of conditions" analysis in federal court's consideration of Eighth Amendment challenge to prison conditions, 85 A.L.R. Fed. 750.

3 U.S.—U. S. ex rel. Larkins v. Oswald, 510 F.2d 583 (2d Cir. 1975); Harris v. MacDonald, 532 F. Supp. 36 (N.D. Ill. 1982).

Iowa—Langley v. Scurr, 305 N.W.2d 418 (Iowa 1981).

4 Conn.—Roque v. Warden, Connecticut Correctional Inst., Somers, 181 Conn. 85, 434 A.2d 348 (1980).

5 U.S.—Hewitt v. Helms, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983).

6 N.Y.—Marshall v. Fischer, 103 A.D.3d 726, 958 N.Y.S.2d 800 (2d Dep't 2013).

Presumption of knowledge of contraband

A rule providing a presumption that each inmate in a living unit has knowledge of the presence of contraband found in the living unit, and that each inmate charged as a result of the discovery of such contraband has the burden of coming forward with evidence to rebut the presumption, was not per se unconstitutional under the Due Process Clause of the Fourteenth Amendment.

U.S.—Jensen v. Gunter, 807 F. Supp. 1463 (D. Neb. 1992).

Imposition of discipline on chance of guilt

An inmate's due process rights were not violated by the imposition of discipline on the basis of a one-in-six chance of actual guilt concerning stolen property found in a work area containing the inmate and five others.

U.S.—Harms v. Godinez, 829 F. Supp. 259 (N.D. Ill. 1993).

7 U.S.—Richard v. Fischer, 38 F. Supp. 3d 340 (W.D. N.Y. 2014).

Ky.—Wilson v. Haney, 430 S.W.3d 254 (Ky. Ct. App. 2014).

8 N.Y.—Gunn v. Ward, 71 A.D.2d 856, 419 N.Y.S.2d 182 (2d Dep't 1979), order aff'd, 52 N.Y.2d 1017, 438 N.Y.S.2d 302, 420 N.E.2d 100 (1981).

Trial-type hearing not required

Penalties imposed by a prison administrative adjustment committee for escaping from custody did not amount to punishment in a criminal sense but rather amounted to an administrative disciplinary sanction for breaking the rules of the prison, and in these circumstances, due process did not require a trial-type hearing.

U.S.—Gregory v. Wyse, 512 F.2d 378 (10th Cir. 1975).

9 U.S.—Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); Richard v. Fischer, 38 F. Supp. 3d 340 (W.D. N.Y. 2014).

Colo.—Marymee v. Executive Director of Colorado Department of Corrections, 2014 COA 44, 328 P.3d 284 (Colo. App. 2014).

Notice provided by misbehavior report

Adequate notice is provided, as required to satisfy due process in a prison disciplinary proceeding, when a misbehavior report sets forth the rule violations alleged and the conduct providing a basis for the charges so as to enable the preparation of a defense.

N.Y.—Poe v. Fischer, 107 A.D.3d 1251, 967 N.Y.S.2d 510 (3d Dep't 2013).

10 U.S.—Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); Richard v. Fischer, 38 F. Supp. 3d 340 (W.D. N.Y. 2014).

Colo.—Marymee v. Executive Director of Colorado Department of Corrections, 2014 COA 44, 328 P.3d 284 (Colo. App. 2014).

11 U.S.—Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); Richard v. Fischer, 38 F. Supp. 3d 340 (W.D. N.Y. 2014).

Colo.—Marymee v. Executive Director of Colorado Department of Corrections, 2014 COA 44, 328 P.3d 284 (Colo. App. 2014).

12 U.S.—Battle v. Barton, 970 F.2d 779 (11th Cir. 1992).

13 N.Y.—Madden v. Griffin, 109 A.D.3d 1060, 971 N.Y.S.2d 586 (3d Dep't 2013), leave to appeal denied, 22 N.Y.3d 860, 981 N.Y.S.2d 670, 4 N.E.3d 972 (2014).

14 U.S.—Underwood v. Loving, 391 F. Supp. 1214 (W.D. Va. 1975).

15 U.S.—Battick v. Stoneman, 421 F. Supp. 213 (D. Vt. 1976); Underwood v. Loving, 391 F. Supp. 1214 (W.D. Va. 1975).
Iowa—Maghee v. Iowa Dist. Court Judge, Reade, 712 N.W.2d 687 (Iowa 2006).
Wash.—Dawson v. Hearing Committee, 92 Wash. 2d 391, 597 P.2d 1353 (1979).

16 Iowa—Giles v. State, 511 N.W.2d 622 (Iowa 1994).
Appointment of lay advocate not required
An inmate who faced a prison disciplinary hearing was not entitled to the assistance of a lay advocate; due process did not require that a lay advocate be appointed unless the inmate was illiterate or the complexity of the issue made it unlikely that the inmate would be able to collect and present evidence necessary for an adequate comprehension of the case.
U.S.—Miller v. Duckworth, 963 F.2d 1002 (7th Cir. 1992).

17 U.S.—Crenshaw v. Sciandra, 766 F. Supp. 2d 478 (W.D. N.Y. 2011).

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16C C.J.S. Constitutional Law § 1775

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

3. Execution of Sentence; Prisons and Prisoners

c. Discipline or Punishment

§ 1775. What process is due in connection with prison discipline or punishment—Time of hearing; impartial decisionmaker; evidence

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4824

A prisoner ordinarily does not have a due process right to a disciplinary hearing within a specific period of time, and a prisoner is not denied due process by a delay which is not in itself of such duration as to constitute a denial of due process, particularly in the absence of prejudice to the prisoner.

A prisoner ordinarily does not have a due process right to a disciplinary hearing within a specific period of time,[1] and a prisoner is not denied due process by a delay which in itself is not of such duration as to constitute a denial of due process,[2] particularly in the absence of prejudice to the prisoner.[3] On the other hand, a prison rule requiring that a hearing be commenced within a period of time after the prisoner's confinement in prehearing detention creates a substantive liberty interest entitled to protection under the Fourteenth Amendment,[4] and such a right may not, consistent with due process of law, be arbitrarily abrogated.[5]

Impartial decisionmaker.

The decisionmaker in a prison disciplinary proceeding must be sufficiently impartial to satisfy the Due Process Clause.[6] In general, however, prison authorities need not be barred from sitting on a disciplinary hearing body,[7] and the fact that a disciplinary body is composed of prison officials in itself does not mean that an accused inmate is deprived of the right to have an accurate and fair factfinding determination prior to the imposition of sanctions.[8] Thus, provided that no member of the disciplinary team has participated or will participate in the case as an investigating or reviewing officer, or is a witness, or has personal knowledge of material facts related to the involvement of accused, or is otherwise personally interested in the outcome of the disciplinary proceeding, a hearing team composed of prison officials satisfies the due process requirement of a neutral and detached hearing body.[9]

Evidence.

Due process requires that, at a minimum, some evidence supports prison disciplinary findings.[10]

The use of hearsay evidence in a prison disciplinary proceeding does not constitute a violation of due process of law.[11] On the other hand, where an inmate disciplinary committee imposes a severe sanction and where the committee's determination is based upon hearsay information derived from an unidentified informant, minimum due process mandates that the committee undertake in good faith to establish the informant's reliability, at least to its own satisfaction.[12] Due process also mandates that there be some information on the record from which a tribunal can reasonably conclude that the committee undertook such an inquiry and concluded that the informant is reliable.[13]

Footnotes

1 U.S.—Carlisle v. Bensinger, 355 F. Supp. 1359 (N.D. Ill. 1973); Dowdy v. Johnson, 510 F. Supp. 836 (E.D. Va. 1981).

2 U.S.—U. S. ex rel. Houston v. Warden, Stateville Correctional Center, 635 F.2d 656 (7th Cir. 1980); Dowdy v. Johnson, 510 F. Supp. 836 (E.D. Va. 1981).

3 U.S.—Dowdy v. Johnson, 510 F. Supp. 836 (E.D. Va. 1981).
N.Y.—Collins v. Coughlin, 83 A.D.2d 657, 442 N.Y.S.2d 191 (3d Dep't 1981).

4 U.S.—King v. Hilton, 525 F. Supp. 1192 (D.N.J. 1981).

5 U.S.—King v. Hilton, 525 F. Supp. 1192 (D.N.J. 1981).
Idaho—Calkins v. May, 97 Idaho 402, 545 P.2d 1008 (1976).
As to the right to a reasonably prompt hearing in disciplinary segregation proceedings, see § 1772.

6 Iowa—Office of Citizens' Aide/Ombudsman v. Edwards, 825 N.W.2d 8 (Iowa 2012).

7 U.S.—Colligan v. U.S., 349 F. Supp. 1233 (E.D. Mich. 1972).

8 Fla.—Myers v. Askew, 338 So. 2d 1128 (Fla. 4th DCA 1976).

9 Fla.—Myers v. Askew, 338 So. 2d 1128 (Fla. 4th DCA 1976).

10 Nev.—Abarra v. State, 342 P.3d 994, 131 Nev. Adv. Op. No. 3 (Nev. 2015).
Wash.—In re Grantham, 168 Wash. 2d 204, 227 P.3d 285 (2010).

11 U.S.—Flythe v. Davis, 407 F. Supp. 137 (E.D. Va. 1976).

12 U.S.—Kyle v. Hanberry, 677 F.2d 1386 (11th Cir. 1982).

13 U.S.—Kyle v. Hanberry, 677 F.2d 1386 (11th Cir. 1982).

16C C.J.S. Constitutional Law § 1776

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

3. Execution of Sentence; Prisons and Prisoners

c. Discipline or Punishment

§ 1776. What process is due in connection with prison discipline or punishment—Witnesses; confrontation; cross-examination; appeal

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4824

In a prison disciplinary proceeding, due process does not guarantee the right to call witnesses, to confront and/or cross-examine accusers or the adverse witnesses in such proceeding, or to appeal from a disciplinary decision.

In a prison disciplinary proceeding, due process does not guarantee the prisoner the right to call witnesses,[1] and while rights created by a prison regulation allowing a prisoner to request that certain witnesses be heard are protected by due process, the right to request witnesses is not an absolute right to have them heard.[2] For example, a prison official's refusal to call witnesses whose testimony would be redundant is not a violation of any established due process right.[3] Prison officials, in accordance with procedural due process, must have the necessary discretion to keep a disciplinary hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority.[4] In any event, due process is violated where an inmate's request to call witnesses is automatically denied.[5] The Due Process Clause requires that prison officials, at some point, state their reasons for refusing to call witnesses requested by an inmate at a disciplinary hearing, but such reasons or support

for reasons are not constitutionally required to be placed in writing or otherwise exist as part of the administrative record at the disciplinary hearing.[6] While prison officials may be required to explain, in a limited manner, the reasons why witnesses were not allowed to testify, they may do so either by making the explanation a part of the administrative record in the disciplinary proceeding or by presenting testimony in court if the deprivation of a "liberty" interest is challenged because of that claimed defect in the hearing.[7]

An inmate is denied due process where prison officials fail to grant a request to call inmate witnesses at a disciplinary hearing without individually examining the witnesses for the relative danger or benefit of their testimony, without offering any rationale for the support of the denial of the request, and without providing a basis for a meaningful judicial review to insure that the inmate is protected from arbitrary government action.[8] Similarly, a policy prohibiting an inmate from calling prison staff members as witnesses in disciplinary proceedings, without an individual determination as to the importance of the particular testimony or interests of the institution, is a denial of due process.[9]

Witnesses in a disciplinary hearing may be permitted to testify by telephone when the inmate has been transferred to another prison.[10]

Confrontation; cross-examination.

In general, due process does not require that a prisoner be allowed to confront and/or cross-examine the prisoner's accusers or the adverse witnesses in a prison disciplinary proceeding.[11]

Appeal.

The Due Process Clause does not guarantee a prisoner a right to an administrative appeal from a disciplinary decision[12] and does not require that prisoners be accorded an automatic appeal to the courts.[13] If the State does provide for such appeals, no liberty interest is conferred upon the prisoner beyond that which the prisoner already enjoys by virtue of the regulations restricting the circumstances under which disciplinary detention can be imposed.[14]

In applying the requirements of due process to the scrutiny of prison disciplinary standards, the courts will not be satisfied with the enforcement of naked constitutional rights as such but will go further to strike down arbitrary action and administrative abuse and to insure procedural fairness in the administrative process.[15] Generally speaking, in the context of prison discipline, if the findings of the prison disciplinary board are supported by some evidence in the record, due process is satisfied.[16]

CUMULATIVE SUPPLEMENT

Cases:

State inmate was denied due process in prison disciplinary proceeding alleging that he had forged another inmate's signature on disbursement forms by hearing officer's failure to make reasonable efforts to identify corrections officers who approved disbursement forms, even if hearing officer was unaware of existence of records identifying officers on duty at time forms were approved, where inmate would have no way of knowing which officers countersigned forms if he in fact did not commit forgery, and nothing on face of disbursement forms, hearing transcript, and staffing records suggested that countersigning officers were, in fact, not readily identifiable. U.S. Const. Amend. 14. Elder v. McCarthy, 967 F.3d 113 (2d Cir. 2020).

An inmate need not demonstrate that video evidence proves or disproves the central allegation of which he or she is charged under prison's disciplinary process in order to obtain and compel consideration of video evidence, but, rather, allowing access to and requiring official consideration of video surveillance evidence represents an essential aspect of the inmate's due process right to assemble evidence in his or her defense. U.S. Const. Amend. 5. Lennear v. Wilson, 937 F.3d 257 (4th Cir. 2019).

Inmate, who alleged that prison officials violated his due process rights when hearing officer failed to produce the requested chain-of-custody report and list of medications prior to or during prison disciplinary hearing, did not assert legally viable due process claim for purposes of his § 1983 action; inmate, who tested positive for opiates, did not proffer what chain-of-custody report or list of medications would have proven, hearing officer confirmed with prison medical staff that inmate's prescribed medications, either alone or in combination, could not have created false-positive test result, and even if he had due process right to receive requested documents, he offered no factual basis to believe that their nondisclosure rendered his disciplinary hearing fundamentally unfair or, for that matter, prejudiced him in any way. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983. Anderson v. Dillman, 824 S.E.2d 481 (Va. 2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Murphy v. Wheaton, 381 F. Supp. 1252 (N.D. Ill. 1974).

2 U.S.—Ra Chaka v. Nash, 536 F. Supp. 613 (N.D. Ill. 1982).
Gang validation procedure
A gang validation procedure for prison inmates comports with the due process requirements of advance written notice of disciplinary charges, opportunity to call witnesses and present documentary evidence when consistent with correctional goals, and a written statement by the fact finder of the evidence relied on and the reasons for the disciplinary action, even though the validation process does not encompass calling witnesses, since institutional safety and correctional goals would be unduly jeopardized by calling witnesses given the security concerns and confidential nature of the material used in the validation process.
Cal.—In re Fernandez, 212 Cal. App. 4th 1199, 151 Cal. Rptr. 3d 571 (3d Dist. 2013), review denied, (Apr. 10, 2013).

3 U.S.—Holland v. Goord, 758 F.3d 215 (2d Cir. 2014).

4 U.S.—Colantuono v. Hockeborn, 801 F. Supp. 2d 110 (W.D. N.Y. 2011).

5 U.S.—U. S. ex rel. Speller v. Lane, 509 F. Supp. 796 (S.D. Ill. 1981).

6 U.S.—Ponte v. Real, 471 U.S. 491, 105 S. Ct. 2192, 85 L. Ed. 2d 553 (1985).

7 U.S.—Ponte v. Real, 471 U.S. 491, 105 S. Ct. 2192, 85 L. Ed. 2d 553 (1985); McGuinness v. Dubois, 75 F.3d 794 (1st Cir. 1996).

8 Ala.—Dumas v. State, 654 So. 2d 48 (Ala. Crim. App. 1994).
Interview of only one witness
Where an inmate requested that certain inmate witnesses be called and provided hearing officers with their names, the inmate's due-process procedural rights were violated when only one was personally interviewed.
N.Y.—Jones v. Coughlin, 112 Misc. 2d 232, 446 N.Y.S.2d 849 (Sup 1982).

9 U.S.—Ramer v. Kerby, 936 F.2d 1102 (10th Cir. 1991).
Failure to collect written statements
The failure of prison officials to collect written statements from witnesses whose presence is requested by a prisoner, but who prison authorities know or should know will be unable to attend the disciplinary hearing, constitutes a denial of due process.
U.S.—Green v. Nelson, 442 F. Supp. 1047 (D. Conn. 1977).

10 Wash.—Matter of Plunkett, 57 Wash. App. 230, 788 P.2d 1090 (Div. 1 1990).

11 U.S.—Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); Guerrero v. Recktenwald, 542 Fed. Appx. 161 (3d Cir. 2013).

Fla.—Piccirillo v. Wainwright, 382 So. 2d 743 (Fla. 1st DCA 1980).

N.Y.—Gunn v. Ward, 71 A.D.2d 856, 419 N.Y.S.2d 182 (2d Dep't 1979), order aff'd, 52 N.Y.2d 1017, 438 N.Y.S.2d 302, 420 N.E.2d 100 (1981).

Confrontation and cross-examination at discretion of prison officials

The Federal Due Process Clause does not require that an inmate subjected to a disciplinary hearing be allowed to test credibility through confrontation and cross-examination of those furnishing evidence against him; rather, the exercise of the right to confrontation and cross-examination in disciplinary hearings is left to the discretion of prison officials.

Mass.—Nelson v. Commissioner of Correction, 390 Mass. 379, 456 N.E.2d 1100 (1983).

12 U.S.—King v. Hilton, 525 F. Supp. 1192 (D.N.J. 1981); U. S. ex rel. Jones v. Rundle, 358 F. Supp. 939 (E.D. Pa. 1973); Kelly v. Cooper, 502 F. Supp. 1371 (E.D. Va. 1980).

13 Alaska—McGinnis v. Stevens, 543 P.2d 1221 (Alaska 1975).

14 U.S.—King v. Hilton, 525 F. Supp. 1192 (D.N.J. 1981).

15 N.J.—Avant v. Clifford, 67 N.J. 496, 341 A.2d 629 (1975).

16 Ky.—Ramirez v. Nietzel, 424 S.W.3d 911 (Ky. 2014).

End of Document

16C C.J.S. Constitutional Law § 1777

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

4. Appeal and Error; Postconviction Relief

§ 1777. Appeal and error in criminal cases

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4765 to 4771

An appeal in criminal cases is not a requisite of due process, but where an appeal is granted, the appellate process must conform to the requirements of due process.

A right of review in criminal cases by an appellate court is not a necessary element of due process of law, and it is wholly within the discretion of each state to refuse it or to grant it on terms[1] provided it does not deny an appeal to certain persons while granting it to other persons similarly situated.[2] On the other hand, once the right of appeal has been granted, the appellate process must comply with the requirements of due process.[3] Where the legislature has provided the right of an appeal, the minimum essential elements of due process of law, in an appeal affecting a person's life, liberty, or property, are notice and opportunity to be heard at a meaningful time and in a meaningful manner.[4] Due process also requires a reasonably accurate and complete record of the trial proceeding to allow meaningful and effective appellate review.[5]

Due process does not require that the accused be advised of the right to appeal and the procedure necessary to enforce that right,[6] at least in the absence of an appearance of indigency.[7] However, a state may not foreclose access to any phase of criminal

appellate proceedings to persons because of their poverty.[8] Thus, to comport with due process, a state's processes must provide an indigent criminal appellant with the minimal safeguards necessary to make an adequate and effective appeal,[9] and transcripts and copies of court records generally must be furnished without cost to indigent persons.[10]

The accused is entitled to have the validity of the conviction appraised on consideration of the case as it was tried and as the issues were determined in the trial court.[11] While due process does not override the basic law of preservation of an issue for appeal in a criminal case,[12] errors that affect substantial rights of the accused are reviewable by the appellate court even absent contemporaneous objection.[13] The fact finder's discretion as to the interpretation of the evidence will be impinged upon on appeal only to the extent necessary to guarantee due process.[14] The reweighing of aggravating and mitigating circumstances on appeal in a capital case under a state's sentencing scheme does not violate due process.[15]

On review of a conviction for legal sufficiency, if, based on all the evidence, a reasonably minded jury must necessarily entertain a reasonable doubt of the defendant's guilt, due process requires that the appellate court reverse and order a judgment of acquittal.[16]

Limitations on time to perfect appeal.

Limitations placed upon the time within which to perfect an appeal ordinarily do not violate due process.[17] At a minimum, it is lawful under the Due Process Clause to end the judicial review process at some point in capital cases despite the purely theoretical possibility that the defendant might have been able to demonstrate the defendant's innocence in the future.[18]

Right to appellate counsel.

The Due Process Clause guarantees a criminal defendant the effective assistance of counsel in a first appeal as of right.[19] Furthermore, due process requires that all plea-convicted indigent defendants have the right to appellate counsel when seeking leave to appeal.[20]

CUMULATIVE SUPPLEMENT

Cases:

The procedural due process inspection instructed by *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18, requiring a court to evaluate the private interest affected, the risk of erroneous deprivation of that interest through the procedures used, and the governmental interest at stake, governed the determination of whether Colorado's statutory scheme requiring exonerated defendants to prove their innocence by clear and convincing evidence to obtain the refund of costs, fees, and restitution paid pursuant to an invalid conviction violated due process, rather than the standard from *Medina v. California,* 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353, requiring a court to ask whether defendants were exposed to a procedure offensive to a fundamental principle of justice, since the scheme addressed the continuing deprivation of property after a conviction had been reversed or vacated, with no prospect of reprosecution. U.S.C.A. Const.Amend. 14; West's C.R.S.A. §§ 13–65–101(1), 13–65–102. Nelson v. Colorado, 137 S. Ct. 1249 (2017).

Colorado's statutory scheme requiring defendants whose convictions have been reversed or vacated, with no prospect of reprosecution, to prove their innocence by clear and convincing evidence in order to obtain the refund of costs, fees, and restitution paid pursuant to the invalid conviction violated due process; once the convictions were erased, the defendants' presumption of innocence was restored, defendants' interest in regaining their funds was high, the risk under the scheme of

erroneous deprivation of the funds extracted from defendants was unacceptable, and the State had no countervailing interests in retaining the amounts in question. U.S.C.A. Const.Amend. 14; West's C.R.S.A. §§ 13–65–101(1), 13–65–102. Nelson v. Colorado, 137 S. Ct. 1249 (2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Jones v. Barnes, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983); Hart v. MCI Concord Superintendent, 36 F. Supp. 3d 186 (D. Mass. 2014).
Ind.—Riner v. Raines, 274 Ind. 113, 409 N.E.2d 575 (1980).
N.C.—Matter of Vandiford, 56 N.C. App. 224, 287 S.E.2d 912 (1982).
Discretion as to method
The states have wide discretion in the manner of adjudicating a claim that a conviction is unconstitutional and can devise their own systems of review.
U.S.—Carter v. People of State of Illinois, 329 U.S. 173, 67 S. Ct. 216, 91 L. Ed. 172 (1946).

2 U.S.—Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891, 55 A.L.R.2d 1055 (1956); Joensen v. Wainwright, 615 F.2d 1077 (5th Cir. 1980).
La.—State v. Petterway, 403 So. 2d 1157 (La. 1981).

3 U.S.—Ayala v. Wong, 756 F.3d 656 (9th Cir. 2014), petition for certiorari filed, 135 S. Ct. 401, 190 L. Ed. 2d 288 (2014).
Tex.—Coutta v. State, 385 S.W.3d 641 (Tex. App. El Paso 2012).
Wash.—State v. Burton, 165 Wash. App. 866, 269 P.3d 337 (Div. 3 2012).
Due process and equal protection considerations
If a state creates appellate courts as an integral part of the system for finally adjudicating the guilt or innocence of a defendant, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.
Ill.—People v. Wright, 311 Ill. App. 3d 1042, 244 Ill. Dec. 338, 725 N.E.2d 811 (5th Dist. 2000).

4 Kan.—Atkinson v. Board of Educ., Unified School Dist. No. 383, 235 Kan. 793, 684 P.2d 424, 18 Ed. Law Rep. 1061 (1984).
Dismissals for failure to comply with rules
(1) It violates due process to dismiss a criminal defendant's appeal based on violation of the rules of appellate procedure by the defendant's lawyer.
Wash.—State v. Tomal, 133 Wash. 2d 985, 948 P.2d 833 (1997).
(2) A court's dismissal of an appeal without considering the merits, for failing to properly perfect the appeal, could not be characterized as a denial of due process where the petitioner's failure to properly perfect was not attributable to state.
U.S.—Van Duyse v. Israel, 486 F. Supp. 1382 (E.D. Wis. 1980).

5 Cal.—People v. Elliott, 53 Cal. 4th 535, 137 Cal. Rptr. 3d 59, 269 P.3d 494 (2012).
Kan.—State v. Carr, 300 Kan. 1, 331 P.3d 544 (2014).

6 Ill.—People v. Breedlove, 213 Ill. 2d 509, 290 Ill. Dec. 602, 821 N.E.2d 1176 (2004).
Kan.—Tuscano v. State, 206 Kan. 260, 478 P.2d 213 (1970).
Me.—State v. Mower, 254 A.2d 604 (Me. 1969).

7 Me.—State v. Mower, 254 A.2d 604 (Me. 1969).

8 U.S.—Hamrick v. Norton, 322 F. Supp. 424 (D. Kan. 1970), judgment aff'd, 436 F.2d 940 (10th Cir. 1971); Lamar v. State of Tex., 356 F. Supp. 42 (S.D. Tex. 1973).
Pa.—Com. v. Regan, 240 Pa. Super. 635, 359 A.2d 403 (1976).

9 N.Y.—People v. Perez, 23 N.Y.3d 89, 989 N.Y.S.2d 418, 12 N.E.3d 416 (2014), cert. denied, 135 S. Ct. 229, 190 L. Ed. 2d 173 (2014) and cert. denied, 135 S. Ct. 273, 190 L. Ed. 2d 201 (2014).

10 U.S.—Eskridge v. Washington State Bd. of Prison Terms and Paroles, 357 U.S. 214, 78 S. Ct. 1061, 2 L. Ed. 2d 1269 (1958).

Colo.—Hoang v. People, 2014 CO 27, 323 P.3d 780 (Colo. 2014).

Denial of right to timely appeal by failure to provide transcript

Failure to provide a criminal defendant with a transcript of the trial court proceedings, effectively denying the right to a timely appeal, may deprive the defendant of the constitutional right to due process of law.

U.S.—Cooper v. McGrath, 314 F. Supp. 2d 967 (N.D. Cal. 2004).

Transcript or equivalent alternative required

Considering that state appellate rules required a citation to the record in support of each assignment of error, access to that record was a necessity, and the State was thus required, as matter of due process and equal protection, to provide an indigent defendant either a copy of that transcript or alternative that fulfilled the same functions.

U.S.—Greene v. Brigano, 123 F.3d 917, 1997 FED App. 0253P (6th Cir. 1997).

As to the right of an indigent to a transcript under equal protection principles, generally, see § 1348.

As to due process rights of indigents to transcripts, generally, see § 1707.

11 U.S.—Eaton v. City of Tulsa, 415 U.S. 697, 94 S. Ct. 1228, 39 L. Ed. 2d 693 (1974).

12 Ala.—Cosper v. State, 89 So. 3d 186 (Ala. Crim. App. 2010).

13 La.—State v. Day, 158 So. 3d 120 (La. Ct. App. 3d Cir. 2014).

14 La.—State v. Taylor, 118 So. 3d 65 (La. Ct. App. 4th Cir. 2013), writ denied, 134 So. 3d 1169 (La. 2014).

15 U.S.—Reeves v. Hopkins, 76 F.3d 1424 (8th Cir. 1996).

16 Tex.—King v. State, 254 S.W.3d 579 (Tex. App. Amarillo 2008).

17 U.S.—Brown v. Allen, 344 U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469 (1953); Micelli v. LeFevre, 444 F. Supp. 1187 (S.D. N.Y. 1978).

Neb.—State v. Kelley, 198 Neb. 805, 255 N.W.2d 840 (1977).

18 U.S.—U.S. v. Quinones, 313 F.3d 49 (2d Cir. 2002).

19 U.S.—Duvardo v. Giurbino, 649 F. Supp. 2d 980 (N.D. Cal. 2009), aff'd, 410 Fed. Appx. 69 (9th Cir. 2011).

20 U.S.—Halbert v. Michigan, 545 U.S. 605, 125 S. Ct. 2582, 162 L. Ed. 2d 552 (2005).

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16C C.J.S. Constitutional Law § 1778

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Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

4. Appeal and Error; Postconviction Relief

§ 1778. Appeal and error in criminal cases—Delay of appeal

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4767, 4773

Although not every delay in the appeal of a case violates due process, due process can be denied by any substantial retardation of the appellate process.

Although not every delay in the appeal of a case violates due process,[1] due process can be denied by any substantial retardation of the appellate process.[2] In determining whether an appellate delay violated a defendant's due process rights, the court considers the length of the delay, the reason for the delay, the defendant's assertion of the right, and prejudice to the defendant.[3] Only in the rarest of circumstances will the due process right to a speedy disposition be infringed in a postconviction situation without a demonstration of prejudice.[4] Appellate delay is prejudicial when there is a reasonable probability that, but for the delay, the result of the appeal would have been different.[5]

An excessive delay in the furnishing of transcripts necessary for a complete appellate record may also constitute a deprivation of due process.[6]

Death penalty appeals.

The delay inherent in death penalty appeals does not violate due process.[7]

Footnotes

1 U.S.—U.S. v. Pratt, 645 F.2d 89 (1st Cir. 1981); Johnson v. Wyrick, 381 F. Supp. 747 (W.D. Mo. 1974), judgment aff'd, 508 F.2d 123 (8th Cir. 1974).
Mich.—People v. McNamee, 67 Mich. App. 198, 240 N.W.2d 758 (1976).

2 U.S.—Rheuark v. Shaw, 628 F.2d 297 (5th Cir. 1980).
Mo.—State v. Crabtree, 625 S.W.2d 670 (Mo. Ct. App. E.D. 1981).
W. Va.—State v. Pettigrew, 168 W. Va. 299, 284 S.E.2d 370 (1981).
Deprivation of due process by substantial delay
(1) A defendant was deprived of his due process right to a prompt appeal by a delay of almost four years, despite the lack of substantial prejudice from the delay, where the length of the delay was substantial, the delay that was caused by the failure of a court officer to furnish trial transcripts was attributable to the State, and the petitioner made diligent efforts to obtain missing minutes of the transcript.
U.S.—Cameron v. LeFevre, 887 F. Supp. 425 (E.D. N.Y. 1995).
(2) A prisoner was entitled to habeas relief from a due process violation resulting from the state appellate court's delay of nearly four years in hearing his appeal from his conviction, and the prisoner would have to be released if his appeal was not heard within 90 days.
U.S.—Coe v. Thurman, 922 F.2d 528 (9th Cir. 1990).

3 Ga.—Singleton v. State, 326 Ga. App. 609, 757 S.E.2d 211 (2014), cert. denied, (June 30, 2014).
Tex.—Coutta v. State, 385 S.W.3d 641 (Tex. App. El Paso 2012).

4 Colo.—Hoang v. People, 2014 CO 27, 323 P.3d 780 (Colo. 2014).

5 Ga.—Smith v. State, 292 Ga. 588, 740 S.E.2d 129 (2013).

6 U.S.—Rheuark v. Shaw, 628 F.2d 297 (5th Cir. 1980).
W. Va.—State ex rel. Tune v. Thompson, 151 W. Va. 282, 151 S.E.2d 732 (1966).
No denial of due process shown
A 17-month delay in furnishing trial transcripts to be used by the appellate court, although unfortunate, did not constitute a denial of due process.
Me.—State v. Rippy, 626 A.2d 334 (Me. 1993).

7 Cal.—People v. Wallace, 44 Cal. 4th 1032, 81 Cal. Rptr. 3d 651, 189 P.3d 911 (2008), as modified, (Oct. 22, 2008).

16C C.J.S. Constitutional Law § 1779

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

4. Appeal and Error; Postconviction Relief

§ 1779. Postconviction relief

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4836

While there is no constitutional right to a postconviction proceeding, when a state undertakes to provide collateral relief, due process requires that the proceeding be fundamentally fair.

While there is no constitutional right to a postconviction proceeding,[1] when a state undertakes to provide collateral relief, due process requires that the proceeding be fundamentally fair.[2] For example, due process concerns allow a postconviction movant to disqualify a judge on the grounds that the judge is biased and prejudiced against the movant.[3] The courts must construe and interpret available remedies in a manner which accords with the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.[4] However, when a state chooses to offer help to those seeking relief from convictions, due process does not dictate the exact form such assistance must assume.[5] In a postconviction proceeding, all that due process requires is that the defendant be provided meaningful access to the judicial process.[6]

A requirement that a postconviction hearing petition meet certain threshold requirements in order to gain permission to proceed does not violate due process.[7] Due process does not require courts to provide an unlimited opportunity to present postconviction claims or prevent a court from establishing limits on the number of pages in a petition for postconviction relief.[8]

Evidentiary hearing.

Due process does not require that a state grant a prisoner an evidentiary hearing in connection with a postconviction application,[9] in the absence of a finding of a substantial issue of fact or law raised by a motion for postconviction relief.[10]

Newly discovered evidence.

Due process allows postconviction petitioners to make freestanding claims of actual innocence based on newly discovered evidence.[11]

Appointment of counsel.

Due process requires appointment of counsel in certain postconviction proceedings in which fundamental fairness necessitates the assistance of a trained advocate.[12] An indigent prisoner has no due process right to appointed counsel in a postconviction proceeding after exhaustion of the appellate process.[13] The Due Process Clause of the Fourteenth Amendment does not require states to appoint counsel for indigent death row inmates seeking state postconviction relief.[14]

Appointment of experts.

Denial of a defendant's motion, in a postconviction proceeding, for appointment of an expert to assist in the presentation of the defendant's claims does not violate due process in the absence of a showing that such assistance is necessary to support the defendant's claims.[15]

CUMULATIVE SUPPLEMENT

Cases:

State supreme court justice, who as district attorney had given approval to seek death penalty against inmate, violated due process by not recusing himself and participating in supreme court's decision to reverse a state postconviction court's grant of relief, based on *Brady* violations that had occurred at trial, and reinstate the inmate's death sentence; justice's decision as district attorney to seek the death penalty amounted to significant, personal involvement in a critical trial decision, and not a mere ministerial role, and this significant, personal involvement gave rise to an unacceptable risk of actual bias that endangered the appearance of neutrality. U.S.C.A. Const.Amend. 14. Williams v. Pennsylvania, 136 S. Ct. 1899 (2016).

State supreme court justice's due process violation, in not recusing himself and participating in supreme court's decision on petition for postconviction relief to reinstate inmate's death sentence, which justice had authorized when he was district attorney, was not harmless, regardless of whether the justice's vote was dispositive, and thus inmate was entitled to present his claims to the supreme court without the participation of the justice; justice's participation in inmate's case was an error that affected the state supreme court's whole adjudicatory framework. U.S.C.A. Const.Amend. 14. Williams v. Pennsylvania, 136 S. Ct. 1899 (2016).

Rooker-Feldman doctrine did not bar convicted state prisoner's § 1983 action challenging constitutionality of Texas postconviction DNA statute. 42 U.S.C.A. § 1983; Vernon's Ann.Texas C.C.P. art. 64.01(b). Skinner v. Switzer, 562 U.S. 521, 131 S. Ct. 1289, 179 L. Ed. 2d 233 (2011).

When entering amended judgment following partial grant of defendant's motion to vacate sentence, District Court did not violate due process by merely vacating the convictions and accompanying sentences that were unlawful because of intervening changes in the law on merger of offenses, while leaving intact defendant's original sentence for certain crack cocaine offenses, which was imposed before the Fair Sentencing Act enacted more lenient penalties for crack cocaine offenses; there was nothing constitutionally unfair about leaving defendant's non-merged convictions in place in view of the evidence at his trial and the law then in effect. U.S. Const. Amend. 5; 28 U.S.C.A. § 2255(b). United States v. Palmer, 854 F.3d 39 (D.C. Cir. 2017).

Capital defendant's due process rights were not violated by trial court summarily dismissing his post-conviction claims without an evidentiary hearing; defendant was provided opportunity to collaterally attack criminal convictions in post-conviction petition, and evidentiary hearing was only afforded if genuine issue of material fact, if resolved in defendant's favor, would have resulted in post-conviction relief. U.S. Const. Amend. 14; Idaho Code Ann. § 19-2719. State v. Hall, 163 Idaho 744, 419 P.3d 1042 (2018).

Trial court failed to give petitioner meaningful opportunity to respond to state's motion to dismiss, and thus violated petitioner's right to procedural due process in proceeding for relief from judgment concerning conviction of first-degree murder; trial court considered state's motion two days after it was filed and dismissed petition based on state's arguments, and there was no indication that petitioner was given opportunity to respond. U.S. Const. Amend. 14, § 1; Ill. Const. art. 1, § 2; 735 Ill. Comp. Stat. Ann. 5/2-1401. People v. Bradley, 416 Ill. Dec. 724, 85 N.E.3d 591 (App. Ct. 4th Dist. 2017).

Circuit Court's sua sponte dismissal, for failure to properly serve State, of defendant's petition for relief from judgment did not violate defendant's due process rights or his right of access to the courts, notwithstanding defendant's absence from hearing on State's motion to dismiss petition, since defendant had adequate procedural safeguards to prevent erroneous sua sponte dismissal, including his filing of motion to reconsider dismissal and filing of appeal from dismissal. U.S. Const. Amends. 1, 14; 720 Ill. Comp. Stat. Ann. 5/2-1401; Ill. Sup. Ct. R. 105(b). People v. Smith, 2017 IL App (3d) 150265, 416 Ill. Dec. 609, 84 N.E.3d 591 (App. Ct. 3d Dist. 2017).

Postconviction DNA testing statute, which denied inmate serving a life sentence for conspiracy to commit murder access to postconviction DNA testing but granted those convicted of statutorily-defined crimes of violence the right to petition for such testing, did not violate inmate's due process rights under federal Due Process Clause or state Declaration of Rights; processes by which to seek postconviction DNA testing were neither offense to traditional principals of justice nor fundamentally unfair, other procedures available to inmate demonstrated that postconviction DNA testing procedures were not constitutionally inadequate to protect inmate's limited liberty interest in postconviction relief, and limitation on access to DNA testing based on petitioner's type of crime was policy determination for which there was no reason to disturb. U.S. Const. Amend. 14, § 1; Md. Const. Declaration of Rights, art. 24; Md. Code Ann., Crim. Proc. § 8-201(b); Md. Code Ann., Crim. Law § 14-101(a). Washington v. State, 450 Md. 319, 148 A.3d 341 (2016).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Caudill v. Conover, 871 F. Supp. 2d 639 (E.D. Ky. 2012).
Ark.—Engram v. State, 2013 Ark. 424, 430 S.W.3d 82 (2013).
Mo.—Price v. State, 422 S.W.3d 292 (Mo. 2014).
Curtailment or abolishment of postconviction relief permitted

The Federal Constitution does not require states to provide for postconviction relief, and such relief may be curtailed or even abolished without violating due process.

Wyo.—Harlow v. State, 2005 WY 12, 105 P.3d 1049 (Wyo. 2005), subsequent determination, 2005 WY 16, 105 P.3d 1078 (Wyo. 2005).

2 U.S.—Caudill v. Conover, 871 F. Supp. 2d 639 (E.D. Ky. 2012).

Ark.—Thomas v. State, 2014 Ark. 123, 431 S.W.3d 923 (2014).

Opportunity to testify

An evidentiary hearing on defendant's motion for postconviction relief that was conducted in defendant's absence after an initial hearing on the motion had been continued before defendant had an opportunity to testify so that the trial court could review the transcript of the previous hearing violated defendant's right to due process; postconviction counsel and the trial court had determined that defendant would stay in local jail in case he was needed for testimony at the continued hearing, the trial court relied in part on previous counsel's testimony that he was not asked to file a postconviction motion in ruling that an exception to the two-year limitations period governing a motion when failure to file is due to neglect of counsel did not apply, and defendant did not have an opportunity to testify on the issue that was basic to the trial court's decision.

Fla.—Nunez-Leal v. State, 129 So. 3d 439 (Fla. 2d DCA 2013), mandamus dismissed, 135 So. 3d 288 (Fla. 2014).

3 Mo.—Burgess v. State, 342 S.W.3d 325 (Mo. 2011).

4 Ky.—Baze v. Com., 23 S.W.3d 619 (Ky. 2000) (overruled on other grounds by, Leonard v. Com., 279 S.W.3d 151 (Ky. 2009)).

Judicial interpretations limiting and defining permissible claims

Interpretations of a capital postconviction statute by the court of criminal appeals, so as to limit and define permissible claims, do not violate the defendants' right of access to the courts, permit legislative interference with the judicial power, or deny the defendants due process of law.

Okla.—McCarty v. State, 1999 OK CR 24, 989 P.2d 990 (Okla. Crim. App. 1999).

5 U.S.—District Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009).

6 Fla.—Nunez-Leal v. State, 129 So. 3d 439 (Fla. 2d DCA 2013), mandamus dismissed, 135 So. 3d 288 (Fla. 2014).

Not fundamental right

A petitioner's interest in collaterally attacking a conviction is not a fundamental right that deserves heightened due process protection.

Tenn.—Seals v. State, 23 S.W.3d 272 (Tenn. 2000).

7 Ark.—Robinson v. State, 295 Ark. 693, 751 S.W.2d 335 (1988).

Rule governing time for filing of petition

Application of a rule governing the time for filing a petition for postconviction relief after a death warrant has been signed did not violate the constitutional rights to due process, equal protection, and access to courts, in a case in which the signing of a death warrant and application of the rule accelerated the time limit for filing postconviction pleadings by eight months.

Fla.—Remeta v. Dugger, 622 So. 2d 452 (Fla. 1993).

As to statutory time limitations on the filing of motions for postconviction relief, see § 1780.

8 Ark.—Sanders v. State, 352 Ark. 16, 98 S.W.3d 35 (2003).

9 U.S.—Weiland v. Parratt, 530 F.2d 1284 (8th Cir. 1976).

Ill.—People v. Hulvey, 3 Ill. App. 3d 617, 278 N.E.2d 108 (4th Dist. 1972).

10 Kan.—Collins v. State, 215 Kan. 489, 524 P.2d 715 (1974).

Tex.—Abshire v. State, 438 S.W.2d 928 (Tex. Crim. App. 1969).

11 Ill.—People v. Brown, 2013 IL App (1st) 91009, 370 Ill. Dec. 707, 988 N.E.2d 1063 (App. Ct. 1st Dist. 2013), appeal denied, 374 Ill. Dec. 570, 996 N.E.2d 17 (Ill. 2013) and cert. denied, 134 S. Ct. 1797, 188 L. Ed. 2d 765 (2014).

12 R.I.—State v. Chase, 9 A.3d 1248 (R.I. 2010).

Violation of due process shown

The dismissal of a postconviction petition constitutes a denial of due process where the rule in effect when the defendant was convicted mandated that the trial judge address the defendant personally and advise the defendant that, if he or she wished to assert ineffective assistance of counsel, he or she must do so within

a specified time from the pronouncement and entry of judgment, but the trial judge failed to do so in the defendant's case.

Ark.—Cherry v. State, 323 Ark. 733, 918 S.W.2d 125 (1996).

13 U.S.—Pennsylvania v. Finley, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987).

No due process or equal protection right to counsel

Neither due process nor the equal protection right to meaningful access to the courts requires a state to provide counsel for an individual defendant seeking postconviction relief.

Utah—Parsons v. Barnes, 871 P.2d 516 (Utah 1994).

14 U.S.—Murray v. Giarratano, 492 U.S. 1, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989).

No right to counsel under Eighth or Fourteenth Amendments

Neither the Eighth Amendment nor the Due Process Clause of the Federal Constitution require a state to appoint counsel for indigent death row inmates seeking state postconviction relief.

Neb.—State v. Victor, 242 Neb. 306, 494 N.W.2d 565 (1993), aff'd, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994).

15 Ill.—People v. Wilson, 191 Ill. 2d 363, 247 Ill. Dec. 443, 732 N.E.2d 498 (2000).

Appointment of experts not required

(1) Denial of a postconviction petitioner's request for funds to hire a neuropsychological expert to assist him in establishing his claim that he received ineffective assistance from his prior counsel did not deprive the petitioner of a full and fair opportunity to develop and litigate his ineffective assistance claim or implicate his state or federal constitutional rights to due process where the petitioner did not raise an insanity defense in his capital murder trial or seek funds to engage a neuropsychological expert during the penalty phase thereof and where psychiatrists engaged by the petitioner at state expense concluded that his capacity was not diminished on the day of the murder.

Pa.—Com. v. Fisher, 572 Pa. 105, 813 A.2d 761 (2002).

(2) Denying a motion of a murder defendant seeking postconviction relief for appointment of a third psychiatric expert did not violate the defendant's due process rights, even though additional medical records concerning the defendant's previous mental health history were not discovered until after trial, since two psychiatric experts were appointed at the time of trial to examine the defendant's mental state, and one psychiatrist was asked to reevaluate in light of the new records for the postconviction proceedings.

Ill.—People v. Wright, 149 Ill. 2d 36, 171 Ill. Dec. 424, 594 N.E.2d 276 (1992).

End of Document

16C C.J.S. Constitutional Law § 1780

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Constitutional Law
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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

4. Appeal and Error; Postconviction Relief

§ 1780. Postconviction relief—Statutory provisions

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4836

Statutes governing postconviction relief must comport with the requirements of due process.

When a state undertakes to provide collateral relief, due process requires that the proceeding be fundamentally fair.[1] Where a statute requires that a hearing be held when a petition is filed for postconviction relief, unless the files and records of a case conclusively show that a prisoner is not entitled to relief, due process is denied by a failure to hold such a hearing.[2]

In general, the application of time limits for filing for postconviction relief does not violate a defendant's due process rights.[3] However, in certain circumstances, due process requires tolling a postconviction statute of limitations[4] although the threshold for tolling is very high.[5] One circumstance involves claims for relief that arise after the statute of limitations has expired.[6] Another due process basis for tolling the statute of limitations involves prisoners whose mental incompetence prevents them from complying with the statute's deadline.[7] Attorney error generally does not warrant the due process tolling of postconviction filing deadlines.[8]

CUMULATIVE SUPPLEMENT

Cases:

District court considering abusive litigant's post-conviction relief claims should not have ruled on the merits of the claims, but rather was required to make a pre-filing determination, consistent with its prior order prohibiting new post-conviction relief claims, as to whether the pleading succinctly and concisely established an exception to the statute of limitation and was not subject to summary disposition; litigant asked the district court to do just that by way of motions, and the district court did not act on either motion for leave to file before denying the substantive claim. NDCC §§ 29-32.1-01(3), 29-32.1-09. Everett v. State, 2018 ND 114, 910 N.W.2d 835 (N.D. 2018).

[END OF SUPPLEMENT]

Footnotes

1 § 1779.

2 U.S.—Dougherty v. Wainwright, 491 F. Supp. 1317 (M.D. Fla. 1980); Shingleton v. Wainwright, 451 F. Supp. 462 (M.D. Fla. 1978).
Hearing procedurally flawed
The hearing on defendants' motions for postconviction relief was procedurally flawed and violated the defendants' right to due process, where the court denied the defendants' motion for severance and conducted a consolidated hearing but excluded the defendants from the courtroom while much of the evidence was presented and prevented the defendants' counsel from cross-examining many of the witnesses, and where after the State presented its case-in-chief, the defendants were removed from the courtroom and only allowed to be present while their separate cases were being presented.
Fla.—Teffeteller v. Dugger, 676 So. 2d 369 (Fla. 1996).

3 Minn.—Sanchez v. State, 816 N.W.2d 550 (Minn. 2012).

4 Tenn.—Whitehead v. State, 402 S.W.3d 615 (Tenn. 2013).

5 Tenn.—Bush v. State, 428 S.W.3d 1 (Tenn. 2014).

6 Tenn.—Whitehead v. State, 402 S.W.3d 615 (Tenn. 2013).

7 Tenn.—Whitehead v. State, 402 S.W.3d 615 (Tenn. 2013).

8 Tenn.—Whitehead v. State, 402 S.W.3d 615 (Tenn. 2013).

16C C.J.S. Constitutional Law § 1781

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

4. Appeal and Error; Postconviction Relief

§ 1781. Writ of error coram nobis

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4836

A writ of error coram nobis must be allowed, where such a remedy is available, when a conviction is wrongful because it is based on an error of fact or was obtained by unfair or unlawful methods and no other corrective judicial remedy is available.

A writ of error is a procedure provided by law to obtain review of, and redress from, judicial errors.[1] The writ of error coram nobis, which is available on a proper showing for the purpose of reviewing a judgment after the time for an appeal has expired, meets the requirement of due process of law under the Fourteenth Amendment of the United States Constitution.[2] Such a writ must be allowed where a conviction is wrongful because based on an error of fact or obtained by unfair or unlawful methods, and no other corrective judicial remedy is available.[3] However, the writ will be denied where the petitioner fails to make a showing of substantiality which, according to local procedure, is necessary in order to obtain the extraordinary relief furnished thereby.[4]

CUMULATIVE SUPPLEMENT

Cases:

Defendant's claim that he was actually innocent of the offense to which he pleaded guilty did not establish grounds for the writ of error coram nobis, and thus trial court was not required to hold a hearing on the claim as it related to defendant's petition for the writ; the claim constituted a direct attack on the judgment. Ramirez v. State, 2018 Ark. 32, 536 S.W.3d 614 (2018).

Due process does not require Supreme Court to entertain an unlimited number of petitions to reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis in a particular case. U.S. Const. Amend. 14. Noble v. State, 2016 Ark. 463, 505 S.W.3d 687 (2016).

[END OF SUPPLEMENT]

Footnotes

1 C.J.S., Appeal and Error § 28.

2 U.S.—Taylor v. State of Ala., 335 U.S. 252, 68 S. Ct. 1415, 92 L. Ed. 1935 (1948).
Cal.—People v. Sica, 116 Cal. App. 2d 59, 253 P.2d 75 (2d Dist. 1953).
N.Y.—People v. Guariglia, 303 N.Y. 338, 102 N.E.2d 580 (1951).
As to due process in connection with appeal and error, generally, see § 1777.

3 Ill.—Thompson v. People, 410 Ill. 256, 102 N.E.2d 315 (1951).
Claim of newly discovered evidence
The filing of a petition for a writ of error coram nobis by a capital-murder defendant 13 months after the discovery of evidence did not exceed the reasonable opportunity afforded by due process to present a claim of newly discovered evidence that could show actual innocence of the capital offense; the magnitude and gravity of the penalty of death outweighed the values justifying limits on untimely petitions.
Tenn.—Workman v. State, 41 S.W.3d 100 (Tenn. 2001).
Availability of habeas corpus
Dismissal of an action brought under a statutory substitute for a writ of error coram nobis, to obtain a new trial on the basis of newly discovered evidence, did not deny due process where habeas corpus was available to present that issue.
Ill.—People v. Freeman, 26 Ill. App. 3d 443, 326 N.E.2d 207 (1st Dist. 1974).

4 U.S.—Taylor v. State of Ala., 335 U.S. 252, 68 S. Ct. 1415, 92 L. Ed. 1935 (1948); U. S. ex rel. Delman v. Butler, 390 F. Supp. 606 (E.D. N.Y. 1975); U.S. ex rel. Conomos v. LaVallee, 363 F. Supp. 994 (S.D. N.Y. 1973).

16C C.J.S. Constitutional Law § 1782

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Constitutional Law
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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

5. Parole, Pardon, and Commutation of Sentence

§ 1782. Parole

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4838

There generally is no due process right to parole, but state statutes may create liberty interests in parole release that are entitled to protection under the Due Process Clause.

A right to parole does not exist as an aspect of the Due Process Clause,[1] and a state is under no constitutional obligation to create a parole system.[2] Parole release procedures afford no more than an expectation, or hope, of parole, and ordinarily do not create a protected liberty interest, and thus are free from the restraint of due process strictures.[3] Accordingly, an administrative decision on whether to grant an inmate release on parole, however serious the impact, does not automatically invoke due process protection.[4]

A statute which provides for the mere possibility of parole does not create a liberty interest protected by due process[5] because it depends wholly on the unfettered exercise of discretion by a board or other authority.[6] A statute vesting discretion in an agency of the State to grant parole creates no expectancy of parole or constitutional liberty sufficient to establish a right of procedural

due process, and thus, the agency has the discretion to rescind an unexecuted order for a prisoner to receive parole at a future date without providing a hearing.[7]

On the other hand, state statutes may create liberty interests in parole release that are entitled to protection under the Due Process Clause.[8] A liberty interest protected by due process arises when a state establishes a scheme whereby release on parole is mandatory unless specified conditions are found to exist.[9] Also, specific language in a statute can create a liberty interest in parole release that requires some form of due process protection where the statute limits discretion of the parole authority.[10] Furthermore, a parole applicant is entitled to a constitutionally adequate and meaningful review of a parole decision because the applicant's due-process liberty interest in parole cannot exist in any practical sense without a remedy against its abrogation.[11]

Even where a statute creates a liberty interest requiring due process in parole release proceedings, a prisoner is not entitled to the full panoply of due process protections,[12] and the amount of due process protection required is less than is required in probation or parole revocation proceedings.[13] Thus, while due process requires that an inmate be advised of adverse information that may lead to an unfavorable decision on parole, and be given an opportunity to address it,[14] due process is satisfied by a parole procedure which affords an opportunity to be heard and informs an inmate in what respects the inmate falls short of qualifying for parole.[15]

Where no prescribed grounds exist on which a parole board is required to grant parole, due process does not require that the board explain its reasons for denying parole.[16] In addition, there is nothing in the due process concepts that require a parole board to specify the particular evidence in an inmate's file or at the interview on which it rests the discretionary determination that an inmate is not ready for conditional release.[17] On the other hand, due process of law requires that a governor's decision to reverse a parole board's decision to grant parol be supported by some evidence in the record; only a modicum of evidence is required.[18]

Original jurisdiction referral.

In federal cases, referral of parole proceedings to the "original jurisdiction" of the National Commissioners of the United States Parole Commission, so that the parole decision is made by the Commission rather than by hearing examiners, does not affect a prisoner's chances for parole and does not violate due process.[19]

CUMULATIVE SUPPLEMENT

Cases:

California law creates a liberty interest in parole; whatever liberty interest exists is, of course, a state interest created by California law. U.S.C.A. Const.Amend. 14. Swarthout v. Cooke, 562 U.S. 216, 131 S. Ct. 859, 178 L. Ed. 2d 732 (2011).

California's some evidence requirement for review of parole decisions is not component of liberty interest in obtaining parole which is protected by federal due process; liberty interest at issue is interest in receiving parole when California standards for parole have been met, and minimum procedures adequate for due process protection of that interest. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Penal Code § 3041(b); 15 CCR §§ 2281, 2402. Swarthout v. Cooke, 562 U.S. 216, 131 S. Ct. 859, 178 L. Ed. 2d 732 (2011).

Inmate failed to assert colorable due process claim to support petition to proceed in forma pauperis in proceeding seeking judicial review of decision of Arkansas Parole Board denying application for parole; there was no liberty interest in parole eligibility. U.S. Const. Amend. 14. Ruiz v. Felts, 2017 Ark. 85, 512 S.W.3d 626 (2017).

Inmate's petition failed to establish that he satisfied criteria to be qualified for a mandatory transfer to the Department of Community Correction (DCC), and thus failed to state a claim even assuming the statute created a liberty interest on the part of the inmate; statute gave Parole Board discretion to either transfer the inmate to the DCC or to deny the transfer and provide a prescribed course of action to be taken by the inmate that will rectify the Parole Board's concerns, and Board chose the alternative of deferring transfer and directing inmate to complete Reduction of Sexual Victimization Program (RSVP). Ark. Code Ann. § 16-93-615. Whiteside v. Arkansas Parole Board, 2016 Ark. 217, 492 S.W.3d 489 (2016).

Additional procedural protections, over and above notice of a hearing, the opportunity to review information, and the opportunity to speak on his own behalf, were required, under state constitutional due process clause, before Board of Pardon and Parole could find inmate to be a sex offender, subject to sex-offender-treatment parole conditions, based on unconvicted sexual conduct for which he was unsuccessfully tried before pleading guilty to logically distinct non-sexual offenses; inmate had never been adjudicated a sex offender in any proceeding, such a finding would trigger uniquely harsh consequences, inmate steadfastly maintained his innocence of sex offense, an erroneous finding would preclude truthful participation in treatment program, and lack of protections would undermine integrity of parole-grant proceedings and risk unjustified sentencing disparities. Utah Const. art. 1, § 7. Neese v. Utah Board of Pardons and Parole, 2017 UT 89, 416 P.3d 663 (Utah 2017).

[END OF SUPPLEMENT]

Footnotes

1 Ark.—Mason v. Hobbs, 2015 Ark. 20, 453 S.W.3d 679 (2015).
Miss.—Ducksworth v. State, 103 So. 3d 762 (Miss. Ct. App. 2012).
Wash.—In re Lain, 179 Wash. 2d 1, 315 P.3d 455 (2013).

2 U.S.—Averhart v. Tutsie, 618 F.2d 479 (7th Cir. 1980); Hunter v. Florida Parole & Probation Commission, 674 F.2d 847 (11th Cir. 1982).

3 Okla.—Shabazz v. Keating, 1999 OK 26, 977 P.2d 1089 (Okla. 1999), as corrected, (Apr. 12, 1999) and as corrected, (July 19, 1999).

4 U.S.—Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979).

5 U.S.—Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979); Averhart v. Tutsie, 618 F.2d 479 (7th Cir. 1980).
Okla.—Phillips v. Williams, 1980 OK 25, 608 P.2d 1131 (Okla. 1980).

6 U.S.—Pugliese v. Nelson, 617 F.2d 916 (2d Cir. 1980).
Ill.—Hill v. Walker, 241 Ill. 2d 479, 350 Ill. Dec. 321, 948 N.E.2d 601 (2011).
No liberty interest in parole prior to expiration of sentence
Because a state parole board had the discretion as to whether to grant parole, a prisoner did not have a due-process protected liberty interest in being paroled prior to the expiration of his sentence.
U.S.—Johnson v. Renico, 314 F. Supp. 2d 700 (E.D. Mich. 2004).

7 Ohio—Hattie v. Anderson, 68 Ohio St. 3d 232, 1994-Ohio-517, 626 N.E.2d 67 (1994).
No federal due process right to have state procedural rules followed
Because a petitioner had no protected liberty interest in parole, he had no right to expect the parole board to follow state procedural rules as a matter of federal due process; thus, the parole board's failure to set the petitioner's release date in accordance with parole guidelines did not give rise to a due process claim.
U.S.—Johnson v. Renico, 314 F. Supp. 2d 700 (E.D. Mich. 2004).
As to the due process right to a hearing in conjunction with revocation of parole, see §§ 1792 to 1797.

8 U.S.—Swarthout v. Cooke, 562 U.S. 216, 131 S. Ct. 859, 178 L. Ed. 2d 732 (2011); Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979); Robles v. Dennison, 745 F. Supp. 2d 244 (W.D. N.Y. 2010), aff'd, 449 Fed. Appx. 51 (2d Cir. 2011).

9 U.S.—Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979); Wansley v. Mississippi Dept. of Corrections, 769 F.3d 309 (5th Cir. 2014).

Mandatory language

A state may create a protected liberty interest in parole, implicating due process rights, by the use of mandatory language, such as "shall," in statutes or regulations, which creates a legitimate expectation that parole will be granted when designated conditions occur.

Mo.—Miller v. Missouri Dept. of Corrections, 436 S.W.3d 692 (Mo. Ct. App. W.D. 2014), transfer denied, (July 23, 2014).

10 Mich.—In re Parole of Hill, 298 Mich. App. 404, 827 N.W.2d 407 (2012).

11 Cal.—In re Lawrence, 44 Cal. 4th 1181, 82 Cal. Rptr. 3d 169, 190 P.3d 535 (2008).

12 W. Va.—Tasker v. Mohn, 165 W. Va. 55, 267 S.E.2d 183 (1980).

13 U.S.—Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979); Young v. U. S. Parole Com'n, 682 F.2d 1105 (5th Cir. 1982).

No right to challenge consideration of letter from prosecutor

A prisoner did not have a protected liberty interest in the grant of parole which could support a due process claim challenging the allegedly improper consideration by a parole board of a letter from the prosecuting attorney, urging that the prisoner not be paroled, which was contained in his file.

Okla.—Shabazz v. Keating, 1999 OK 26, 977 P.2d 1089 (Okla. 1999), as corrected, (Apr. 12, 1999) and as corrected, (July 19, 1999).

As to the requisites and sufficiency of a probation revocation hearing, generally, see § 1788.

As to the requisites and sufficiency of a parole revocation hearing, generally, see § 1795.

14 U.S.—Williams v. Missouri Bd. of Probation and Parole, 661 F.2d 697 (8th Cir. 1981).

15 U.S.—Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979).

Ind.—Young v. Duckworth, 271 Ind. 554, 394 N.E.2d 123 (1979).

Kan.—Hannon v. Maynard, 3 Kan. App. 2d 522, 597 P.2d 1125 (1979).

Preprinted rationale sheets sufficient

Preprinted rationale sheets used by a board of parole for checking off mitigating and aggravating factors deemed relevant in making a parole determination provided a sufficiently detailed explanation to satisfy due process.

Utah—Padilla v. Utah Bd. of Pardons and Parole, 947 P.2d 664 (Utah 1997).

16 Ga.—Georgia State Bd. of Pardons and Paroles v. Turner, 248 Ga. 767, 285 S.E.2d 731 (1982).

17 U.S.—Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979); Partee v. Lane, 528 F. Supp. 1254 (N.D. Ill. 1981).

18 Cal.—In re Dannenberg, 173 Cal. App. 4th 237, 92 Cal. Rptr. 3d 647 (6th Dist. 2009), publication ordered, 93 Cal. Rptr. 3d 537, 207 P.3d 2 (Cal. 2009).

19 U.S.—Wilden v. Fields, 510 F. Supp. 1295 (W.D. Wis. 1981).

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16C C.J.S. Constitutional Law § 1783

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

5. Parole, Pardon, and Commutation of Sentence

§ 1783. Pardon

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4837

A prisoner's expectation that the prisoner will be pardoned is simply a unilateral hope, but the Due Process Clause applies to the revocation of conditional pardons.

There is no Fourteenth Amendment property or liberty interest in obtaining a pardon.[1] In terms of the Due Process Clause, a prisoner's expectation that the prisoner will be pardoned is no more substantial than an inmate's expectation, for example, that an inmate will not be transferred to another prison, and it is simply a unilateral hope.[2] On the other hand, the Due Process Clause applies to the revocation of conditional pardons,[3] and a pardon cannot be revoked without a hearing[4] which conforms to the due process requirements set out in the decisions of the United States Supreme Court relating to the revocation of parole or probation.[5]

The Due Process Clause is not violated where clemency and pardon procedures do no more than confirm that the clemency and pardon power is committed to the authority of the executive.[6]

Footnotes

1 U.S.—District Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009); Antia-Perea v. Holder, 768 F.3d 647 (7th Cir. 2014).

2 U.S.—Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 101 S. Ct. 2460, 69 L. Ed. 2d 158 (1981).
As to due process with respect to transfers of prisoners, see § 1766.

3 U.S.—Pope v. Chew, 521 F.2d 400 (4th Cir. 1975).

4 U.S.—Pope v. Chew, 521 F.2d 400 (4th Cir. 1975); Fleenor v. Hammond, 116 F.2d 982, 132 A.L.R. 1241 (C.C.A. 6th Cir. 1941).
Md.—State ex rel. Murray v. Swenson, 196 Md. 222, 76 A.2d 150 (1950).
Due process not violated by irregularities in notice process
Clemency proceedings provided by a board to a prisoner did not violate the prisoner's right to due process, despite some irregularities in the notice process, where the prisoner was given notice of the date and time of the clemency hearing more than two weeks before it was held, received a letter outlining the procedures which would be followed, and had an opportunity to present his case at the hearing.
Okla.—Sellers v. State, 1999 OK CR 6, 973 P.2d 894 (Okla. Crim. App. 1999).

5 U.S.—Pope v. Chew, 521 F.2d 400 (4th Cir. 1975).
As to revocation of probation, generally, see § 1785.
As to revocation of parole, generally, see § 1792.

6 U.S.—Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 118 S. Ct. 1244, 140 L. Ed. 2d 387 (1998).
Clemency entirely discretionary
Inmates scheduled to be executed were not denied due process in clemency proceedings where, under state law, clemency was entirely within the discretion of the governor, and no standards for granting clemency existed to create a protected interest in clemency on behalf of the inmates.
U.S.—Richley v. Gaines, 860 F. Supp. 636 (E.D. Ark. 1994), aff'd, 42 F.3d 1394 (8th Cir. 1994).

16C C.J.S. Constitutional Law § 1784

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

5. Parole, Pardon, and Commutation of Sentence

§ 1784. Commutation of sentence

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4837

A prisoner's expectation that a lawfully imposed sentence will be commuted is simply a unilateral hope, and a prisoner's interest in the commutation of a sentence does not by itself trigger due process protection.

In terms of the Due Process Clause, a prisoner's expectation that a lawfully imposed sentence will be commuted is no more substantial than an inmate's expectation, for example, that the inmate will not be transferred to another prison,[1] and it is simply a unilateral hope.[2] Thus, an inmate's interest in the commutation of a sentence does not by itself trigger due process protection,[3] and where an applicant has been denied commutation, due process does not require that the applicant be provided with the reasons for the denial.[4]

On the other hand, due process rights must be afforded in proceedings to revoke parole,[5] and with regard to due process, conditional commutation revocation is substantially similar to parole revocation.[6] As with parole revocations, the decision to revoke a commutation deprives anindividual not of the absolute liberty to which every citizen is entitled but only of the

conditional liberty properly dependent on observance of special conditions.[7] The decision to revoke a commutation is not a criminal proceeding, and thus, commutees are not entitled to all of the protections afforded to criminal defendants.[8]

Footnotes

1 U.S.—Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 101 S. Ct. 2460, 69 L. Ed. 2d 158 (1981).
Appeal for clemency
In terms of due process, an application for commutation is nothing more than an appeal for clemency.
La.—Bosworth v. Whitley, 627 So. 2d 629 (La. 1993).
As to due process with respect to transfers of prisoners, see § 1766.
As to due process with respect to pardons and clemency, see § 1783.

2 U.S.—Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 101 S. Ct. 2460, 69 L. Ed. 2d 158 (1981).
La.—Bosworth v. Whitley, 627 So. 2d 629 (La. 1993).
No due-process liberty interest
A defendant who has been sentenced to death has no due-process liberty interest in a commutation hearing, other than the right to file an application for commutation, where no "substantive predicates" exist which would limit the discretion of a board of pardons to grant or deny commutation.
Neb.—Otey v. State, 240 Neb. 813, 485 N.W.2d 153 (1992).

3 Ariz.—Banks v. Arizona State Bd. of Pardons & Paroles, 129 Ariz. 199, 629 P.2d 1035 (Ct. App. Div. 1 1981).
Futile hearing
Where the parole board had just heard a prisoner's request for parole and was in a position to know that a hearing upon the prisoner's application for a commutation of sentence would be futile, it was not denial of due process to deny the prisoner's petition without a hearing.
Ariz.—Foggy v. Eyman, 110 Ariz. 185, 516 P.2d 321 (1973).

4 Ariz.—Banks v. Arizona State Bd. of Pardons & Paroles, 129 Ariz. 199, 629 P.2d 1035 (Ct. App. Div. 1 1981).

5 § 1792.

6 Wash.—In re Bush, 164 Wash. 2d 697, 193 P.3d 103 (2008).

7 Wash.—In re Bush, 164 Wash. 2d 697, 193 P.3d 103 (2008).

8 Wash.—In re Bush, 164 Wash. 2d 697, 193 P.3d 103 (2008).

16C C.J.S. Constitutional Law § 1785

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

6. Revocation of Probation, Suspension of Sentence, or Parole

a. Revocation of Probation or Suspension of Sentence

(1) In General

§ 1785. Revocation of probation or suspension of sentence, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4733, 4733(1)

A probation revocation is not a part or a stage of a criminal prosecution, but it does result in a loss of liberty, and due process must therefore be accorded the probationer.

A probation revocation is not a part or a stage of a criminal prosecution,[1] but it does result in a loss of liberty,[2] and due process must therefore be accorded the probationer.[3] Thus, certain minimum requirements must be satisfied to comply with due process.[4] However, probationers do not enjoy the full panoply of constitutional protections afforded criminal defendants.[5] The due process right applicable in probation revocation hearings allows for procedures that are more flexible than in a criminal prosecution; this flexibility allows courts to enforce lawful orders, address an offender's personal circumstances, and protect public safety, sometimes within limited time periods.[6]

Nonetheless, the Due Process Clause of the Fourteenth Amendment of the United States Constitution imposes procedural and substantive limits on the revocation of the conditional liberty created by probation.[7] Due process requirements applicable to revocations of probation include the opportunity to be heard in person and to present witnesses and evidence.[8] The Due Process Clause also requires that a probationer be given an opportunity to confront and cross-examine adverse witnesses.[9] The right to confront and cross-examine adverse witnesses likewise is a minimum due process requirement in a hearing on petition to revoke a defendant's suspended sentence, which applies unless the hearing officer specifically finds good cause for not allowing confrontation.[10]

Where no determination is made as to why a defendant had not complied with probation terms, the deprivation of the defendant's conditional freedom without a finding of a willful violation contravenes due process.[11] On the other hand, a trial court's failure to specify the evidence relied on and the reasons for revoking probation does not violate due process where the evidence is uncontradicted, the defendant has admitted that the defendant violated the conditions as charged, and the defendant has made no additions or corrections to the factual basis presented by the prosecutor.[12]

Revocation of suspension of sentence.

An offender facing revocation of a suspended sentence has only minimal due process rights, the same as those afforded during revocation of probation or parole.[13]

CUMULATIVE SUPPLEMENT

Cases:

Defendant's due process rights were not violated by four-year lapse between issuance of "Montana only" arrest warrant regarding violation of probation terms and execution of warrant after defendant was released from custody in Colorado, returned to Montana, and was stopped for a traffic offense, although defendant sent letter to court while incarcerated in Colorado expressing desire to return to Montana to deal with warrant; securing defendant's presence for executing warrant would have required initiation of a extradition proceeding, defendant did not seek a resolution of warrant after she was released in Colorado, and Montana sentence was specifically imposed as consecutive to the Colorado sentence. Mont. Const. art. 2, § 17. State v. Koon, 2017 MT 283, 405 P.3d 1254 (Mont. 2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973); Goff v. Jones, 500 F.2d 395 (5th Cir. 1974).
Ala.—Austin v. State, 375 So. 2d 1295 (Ala. Crim. App. 1979).

2 U.S.—Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).
Conn.—State v. Barnes, 116 Conn. App. 76, 974 A.2d 815 (2009).
Mass.—Com. v. Kelsey, 464 Mass. 315, 982 N.E.2d 1134 (2013).

3 D.C.—Morgan v. U.S., 47 A.3d 532 (D.C. 2012).
Idaho—State v. Scraggins, 153 Idaho 867, 292 P.3d 258 (2012).
Miss.—Agent v. State, 30 So. 3d 370 (Miss. Ct. App. 2010).
Continuance of probation

(1) Due process must be accorded when a decision is made as to whether a prisoner is be continued on probation.

U.S.—Pugliese v. Nelson, 617 F.2d 916 (2d Cir. 1980).

(2) A probationer has a right to continuance of probation, absent any violation, and such a right is protected by constitutional due process.

Md.—Herold v. State, 52 Md. App. 295, 449 A.2d 429 (1982).

4 Del.—Holmes v. State, 80 A.3d 960 (Del. 2013).

Ky.—Kaletch v. Com., 396 S.W.3d 324 (Ky. Ct. App. 2013).

Fair treatment

When a probationary sentence is revoked, due process requires a following proceeding designed to insure fair treatment of the defendant.

Ark.—Morgan v. State, 267 Ark. 28, 588 S.W.2d 431 (1979).

5 Idaho—State v. Scraggins, 153 Idaho 867, 292 P.3d 258 (2012).

Mass.—Com. v. Bukin, 467 Mass. 516, 6 N.E.3d 515 (2014).

Rationale

In probation revocation proceedings, the probationer does not risk the absolute liberty to which every citizen is entitled but only conditioned liberty properly dependent upon the observation of special probation restrictions; probation acts as a rehabilitative device, and the State has an overwhelming interest in being able to imprison the probationer without the burden of a new adversary criminal trial.

Me.—State v. Maier, 423 A.2d 235 (Me. 1980).

Due process rights of parolees and probationers

Although parolees and probationers have due process rights concerning revocation of their paroles or probations, these due process rights are less than those involved in an ordinary criminal prosecution.

La.—State v. Langley, 711 So. 2d 651 (La. 1998), on reh'g in part, (June 19, 1998).

As to due process rights with respect to revocation or parole, generally, see § 1792.

6 Ind.—Reyes v. State, 868 N.E.2d 438 (Ind. 2007).

7 D.C.—Morgan v. U.S., 47 A.3d 532 (D.C. 2012).

Ind.—Donald v. State, 930 N.E.2d 76 (Ind. Ct. App. 2010).

Kan.—State v. Robinson, 45 Kan. App. 2d 193, 244 P.3d 713 (2011).

Revocation of supervised release

If a federal district court finds that a violation of the conditions of supervised release has occurred, it has the discretion to revoke or modify the defendant's supervised release, except for violations involving firearms or controlled substance offenses, in which case revocation is mandatory.

U.S.—U.S. v. Whalen, 82 F.3d 528 (1st Cir. 1996).

8 Okla.—Baker v. State, 1996 OK CR 49, 927 P.2d 577 (Okla. Crim. App. 1996).

9 Mass.—Com. v. Negron, 441 Mass. 685, 808 N.E.2d 294 (2004).

Purpose of Confrontation Clause

The principal evil at which the Confrontation Clause was directed was the civil law mode of criminal procedure and particularly its use of ex parte examinations as evidence against the accused; the ultimate goal of the Confrontation Clause is to ensure the reliability of evidence, but it is a procedural rather than a substantive guarantee in that it commands not that evidence be reliable but that the reliability be assessed in a particular manner, that is, by testing in the crucible of cross-examination.

U.S.—Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004).

10 Mont.—State v. Megard, 2004 MT 67, 320 Mont. 323, 87 P.3d 448 (2004).

11 S.C.—Barlet v. State, 288 S.C. 481, 343 S.E.2d 620 (1986).

Informal hearing required

The liberty of a parolee or probationer involves significant values entitled to the protection of the Due Process Clause of the Fourteenth Amendment, and termination of that liberty requires an informal hearing to insure that a finding of a parole or probation violation is based on sufficient facts to support a revocation.

Mont.—State v. Hardy, 278 Mont. 516, 926 P.2d 700 (1996).

Failure to hold preliminary probation revocation hearing

Failure to hold a preliminary probation revocation hearing did not deny a defendant due process where, due to the defendant's incarceration on other charges, the defendant suffered no detention or loss of liberty from the absence of a preliminary hearing.

Mass.—Com. v. Odoardi, 397 Mass. 28, 489 N.E.2d 674 (1986).

12 Md.—Jones v. State, 73 Md. App. 267, 533 A.2d 1309 (1987).

13 Wash.—State v. Hand, 173 Wash. App. 903, 295 P.3d 828 (Div. 1 2013), aff'd, 177 Wash. 2d 1015, 308 P.3d 588 (2013).

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16C C.J.S. Constitutional Law § 1786

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6. Revocation of Probation, Suspension of Sentence, or Parole

a. Revocation of Probation or Suspension of Sentence

(1) In General

§ 1786. Notice and preliminary hearing regarding revocation of probation

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4733(2)

With respect to a preliminary hearing, due process requires that a probationer be afforded notice of the alleged violations of probation, and it generally is required that a hearing be given a probationer to determine whether there is reasonable cause to believe the probationer has violated the conditions of probation.

With respect to a preliminary hearing, due process requires that a probationer be afforded notice of the alleged violations of probation.[1] A preliminary hearing generally must be given a probationer to determine whether there is probable cause to believe the probationer has violated the conditions of probation.[2] However, due process may not require a preliminary revocation hearing to be conducted where a final probation revocation hearing is held within a reasonable time after the probationer's arrest,[3] where the probationer waives the preliminary hearing,[4] or where the probationer is not being held in custody.[5]

The due process requirement of a preliminary hearing also does not apply where a probationer is in custody on charges and for reasons separate from the revocation proceedings.[6] Furthermore, a preliminary hearing on a new criminal charge, which constitutes a prima facie probation violation, may also serve as a probation prerevocation probable cause hearing[7] provided that the probationer has notice of the dual purpose of the hearing.[8]

Requisites and sufficiency of hearing.

Due process requires that a preliminary probation revocation hearing be held as promptly as is convenient after an alleged violation while information is fresh and sources are available.[9] In order to assess a violation of the guarantee of a reasonably prompt probation revocation hearing, a balancing test is used whereby the conduct of the prosecution and that of the defendant are weighed.[10] However, where such a preliminary hearing is delayed in order to give a probationer another chance,[11] or where the probationer is not prejudiced by the delay,[12] due process is not denied.

Furthermore, in order to satisfy due process, such a preliminary hearing must be held at or near the place of the alleged violation or arrest[13] and before an independent decisionmaker.[14] On the other hand, due process does not require that a completely neutral person act as the decisionmaker, and an uninvolved employee of a probation department satisfies the latter requirement.[15]

In a preliminary probation revocation hearing, a probationer is entitled, under due process, to an opportunity to appear and present evidence in the probationer's own behalf,[16] a conditional right to confront adverse witnesses,[17] and a written report of the hearing.[18]

A probationer is not always entitled to counsel at a preliminary hearing under the Due Process Clause; rather, counsel may be appointed on a case-by-case basis when legal assistance is necessary as a matter of fundamental fairness.[19]

CUMULATIVE SUPPLEMENT

Cases:

Defendant was not prejudiced, as required to establish a due process violation, by alleged unreasonable delay between his arrest in New York in January and his final supervised release revocation hearing in the District of Columbia (DDC) the following December; although defendant argued that the alleged delay cost him the ability to seek a prison term in DDC that would run concurrently with the one imposed by the Southern District of New York, the court in the DDC consideredand expressly rejectedthe possibility of a concurrent punishment, explained that the proceedings in the two districts involved separate offenses, that the totality of defendant's misconduct was concerning, and that additional incarceration was therefore appropriate. U.S. Const. Amend. 5. United States v. Islam, 932 F.3d 957 (D.C. Cir. 2019).

Trial court abused its discretion by denying defendant's motion and renewed motion to continue community control revocation hearing due to defense counsel's insufficient preparation time without considering factors weighing defendant's right to at least minimal quality of counsel against the interest in efficient court administration; trial court did not address factors on initial motion, and inadequately weighed factors on renewed motion, including that defense counsel had only recently been assigned to the case and had not been able to speak to defendant about his defenses, that defendant did not fire original attorney or otherwise cause reduced preparation time, and that counsel could not contact or subpoena witnesses due to lack of time. Boffo v. State, 272 So. 3d 876 (Fla. 5th DCA 2019).

Probation officer's unavailability warranted granting continuance of trial in probation-violation proceeding, although probationer, who was incarcerated while awaiting trial, would have been prejudiced by continuance; prosecutor subpoenaed

officer, e-mailed officer, called officer's place of employment, and called officer the day before trial and twice on day of trial, and State would have been materially prejudiced by denial of continuance given that, without officer's testimony, it was unable to adduce any evidence to establish that probationer willfully and substantially violated her probation. State v. Dixon, 225 So. 3d 274 (Fla. 4th DCA 2017).

Trial court lacked authority to hold probation revocation hearing after term of probation had expired, where trial court failed to make every reasonable effort to notify probationer and hold hearing before his term ended. Mo. Const. art. 5, § 4; Mo. Ann. Stat. § 559.036. State ex rel. Amorine v. Parker, 490 S.W.3d 372 (Mo. 2016).

In case involving the holding of a probation revocation hearing after expiration of probation term on the optimal discharge date, circuit court's action of merely issuing an arrest warrant for probationer did not constitute the court taking every reasonable effort to notify probationer and to conduct probation revocation hearing prior to expiration of probation, and so the court lacked statutory authority to hold a hearing and revoke probation after expiration of the probation optimal discharge date; State filed supplemental probation violation report 14 months prior to probation term expiring, report indicated that probationer was in custody when report was filed, and he remained in custody on unrelated charge until revocation hearing was held months after expiration of the probation optimal discharge date, such that the court had knowledge of his whereabouts. Mo. Ann. Stat. 559.036.8. State ex rel. Culp v. Rolf, 590 S.W.3d 388 (Mo. Ct. App. W.D. 2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).

2 U.S.—Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973); U.S. v. Davila, 573 F.2d 986 (7th Cir. 1978).
Wyo.—Mason v. State, 631 P.2d 1051 (Wyo. 1981).

3 U.S.—Collins v. Turner, 599 F.2d 657 (5th Cir. 1979).
Cal.—People v. Alexander, 74 Cal. App. 3d 20, 141 Cal. Rptr. 262 (1st Dist. 1977).
Tex.—Whisenant v. State, 557 S.W.2d 102 (Tex. Crim. App. 1977).
Failure to have prompt preliminary hearing
The Due Process Clause of the Fourteenth Amendment of the United States Constitution requires that a probationer, who is arrested for violating the conditions of probation, be afforded both a prompt preliminary hearing and a final revocation hearing, but failure to have a prompt preliminary hearing does not require reversal of an order revoking probation in absence of prejudice to substantial rights of the probationer.
W. Va.—State v. Holcomb, 178 W. Va. 455, 360 S.E.2d 232 (1987).
As to the final probation revocation hearing, see § 1787.

4 Fla.—Lester v. State, 290 So. 2d 108 (Fla. 1st DCA 1974).
Ill.—People v. Knowles, 48 Ill. App. 3d 296, 6 Ill. Dec. 265, 362 N.E.2d 1087 (2d Dist. 1977).
Wash.—State v. Grimm, 17 Wash. App. 683, 564 P.2d 839 (Div. 3 1977).

5 U.S.—U.S. v. Strada, 503 F.2d 1081 (8th Cir. 1974).
Kan.—State v. Malbrough, 5 Kan. App. 2d 295, 615 P.2d 165 (1980).
Wash.—State v. Fry, 15 Wash. App. 499, 550 P.2d 697 (Div. 2 1976).

6 U.S.—U.S. v. Tucker, 524 F.2d 77 (5th Cir. 1975); U.S. v. Sutton, 607 F.2d 220 (8th Cir. 1979); U.S. v. Diaz-Burgos, 601 F.2d 983 (9th Cir. 1979).
Okla.—Wilson v. State, 1980 OK CR 118, 621 P.2d 1173 (Okla. Crim. App. 1980).

7 Mich.—People v. Miller, 77 Mich. App. 381, 258 N.W.2d 235 (1977).

8 Mich.—People v. Miller, 77 Mich. App. 381, 258 N.W.2d 235 (1977).
Mo.—Ewing v. Wyrick, 535 S.W.2d 442 (Mo. 1976).

9 U.S.—Kartman v. Parratt, 535 F.2d 450 (8th Cir. 1976).

10 U.S.—U.S. v. Scott, 850 F.2d 316 (7th Cir. 1988).

11 U.S.—Kartman v. Parratt, 535 F.2d 450 (8th Cir. 1976).

12 U.S.—Kartman v. Parratt, 535 F.2d 450 (8th Cir. 1976).

13 D.C.—U.S. v. Companion, 545 F.2d 308 (2d Cir. 1976).
Wis.—State ex rel. Harris v. Schmidt, 69 Wis. 2d 668, 230 N.W.2d 890 (1975).

14 U.S.—Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).

15 Me.—State v. Sommer, 388 A.2d 110 (Me. 1978).
Neb.—State v. Moreno, 193 Neb. 351, 227 N.W.2d 398 (1975).

16 U.S.—Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).

17 U.S.—Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).

18 U.S.—Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).

19 Conn.—State v. White, 169 Conn. 223, 363 A.2d 143 (1975).
Wis.—State ex rel. Hawkins v. Gagnon, 64 Wis. 2d 394, 219 N.W.2d 252 (1974).

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16C C.J.S. Constitutional Law § 1787

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Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

6. Revocation of Probation, Suspension of Sentence, or Parole

a. Revocation of Probation or Suspension of Sentence

(2) Notice and Final Hearing

§ 1787. Notice and final hearing regarding revocation of probation, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4733(2)

Due process requires that a probationer receive notice of the charges against the probationer, and a final revocation hearing, which must meet minimum due process standards, must be held to determine whether probation should be revoked.

Due process generally requires that a probationer accused of violating a condition of probation receive written[1] notice[2] of the charges against the probationer prior to a revocation hearing and notice of the time and place of the hearing.[3] Under certain circumstances, however, oral[4] or actual,[5] notice satisfies due process.

In any event, in order to comply with the due process requirement, the notice with respect to a revocation hearing must be reasonable, adequate, and specific, clearly and fully setting forth the allegations,[6] and the notice must be given in sufficient time to allow the preparation of a proper defense.[7]

A final hearing to determine whether probation should be revoked ordinarily is required by the Due Process Clause.[8] However, such a hearing is not required by due process where a probationer validly waives the right thereto.[9] Moreover, where a defendant has been given notice that the defendant's conviction in a case might form the basis for revocation of probation, the trial at which the defendant is convicted may be treated as a probation revocation hearing.[10]

Delay.

A probationer has a due process right to a probation revocation hearing within a reasonable time after the probationer is taken into custody.[11] For a delay in the institution and prosecution of a probation revocation proceeding to constitute a denial of due process, the probationer must show that he or she was prejudiced by the delay.[12]

A delay in holding a probation revocation hearing until after the disposition of new criminal charges does not deny due process.[13] Furthermore, due process is not denied by a delay caused by a probationer's incarceration after a conviction for a new offense.[14]

CUMULATIVE SUPPLEMENT

Cases:

Motion court in coordinated asbestos litigation deprived defendants of their right to due process by modifying case management order so as to allow plaintiffs' applications for permission to instruct jury on punitive damages to be made at conclusion of evidentiary phase of trial upon notice to affected defendants; due process required that defendants have opportunity to conduct discovery and establish defense with respect to punitive damages claim, which involved different elements and standards of proof and potentially subjected them to far greater liability than would otherwise be the case, but order left defendants guessing, until close of evidence, whether punitive damages would be sought. U.S.C.A. Const.Amend. 14. In re New York City Asbestos Litigation, 130 A.D.3d 489, 2015 WL 4112801 (1st Dep't 2015).

Probationer's female coworker was adverse witness at hearing to revoke probation for first-degree rape, and therefore, due process required that he be allowed to cross-examination her, regardless of fact that trial court had already found that probationer had committed technical violation of probation condition that he obtain permission from security agent before changing job or address, or leaving state; trial court had not yet announced decision to revoke probation, and coworker's statement formed basis for trial court's finding that probation violation constituted threat to public safety, as justification for imposing sentence of life with all but ten years suspended, rather than presumptive 15-day limit of incarceration for technical violation. U.S. Const. Amend. 14; Md. Code Ann., Crim. Proc. § 6-223(d)(2)(i), (e)(2). Johnson v. State, 247 Md. App. 170, 233 A.3d 275 (2020).

Revocation of defendant's probation for first-degree assault and using handgun in commission of crime of violence did not violate due process based on defendant's assertion that appointed counsel did not have adequate notice of hearing on State's petition for violation of probation; defendant was represented by counsel 14 months before hearing, and although State's petition was styled as "State's Notice for Appropriate Relief," there was no mistake as to its contents, purpose, and allegations. U.S. Const. Amend. 14. McKinney v. State, 239 Md. App. 297, 196 A.3d 520 (2018).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).
Mass.—Com. v. Bynoe, 85 Mass. App. Ct. 13, 4 N.E.3d 1272 (2014).
Miss.—Celestine v. State, 143 So. 3d 633 (Miss. Ct. App. 2014).
Warrant or summons unnecessary
Where a probationer appears in court and has received prior notice of the revocation proceedings, a warrant or summons is not necessary to guarantee due process.
Ill.—People v. Speight, 72 Ill. App. 3d 203, 27 Ill. Dec. 934, 389 N.E.2d 1342 (1st Dist. 1979).

2 Fla.—Lawson v. State, 969 So. 2d 222 (Fla. 2007).
Mass.—Com. v. Bynoe, 85 Mass. App. Ct. 13, 4 N.E.3d 1272 (2014).
Miss.—Celestine v. State, 143 So. 3d 633 (Miss. Ct. App. 2014).
Mont.—State v. Sebastian, 2013 MT 347, 372 Mont. 522, 313 P.3d 198 (2013).

3 D.C.—Colter v. U. S., 392 A.2d 994 (D.C. 1978).
La.—State v. Broussard, 408 So. 2d 909 (La. 1981).
R.I.—State v. Bourdeau, 448 A.2d 1247 (R.I. 1982).

4 Ill.—People v. Reese, 37 Ill. App. 3d 820, 347 N.E.2d 451 (1st Dist. 1976).
Tenn.—Stamps v. State, 614 S.W.2d 71 (Tenn. Crim. App. 1980).

5 Neb.—State v. Calder, 212 Neb. 248, 322 N.W.2d 426 (1982).
Pa.—Com. v. Ball, 242 Pa. Super. 379, 363 A.2d 1322 (1976).

6 Fla.—Brice v. State, 411 So. 2d 934 (Fla. 2d DCA 1982).
Ga.—Burson v. State, 161 Ga. App. 107, 289 S.E.2d 254 (1982).
Mich.—People v. Ojaniemi, 93 Mich. App. 200, 285 N.W.2d 816 (1979).
Conclusory allegation insufficient
Tex.—Matte v. State, 572 S.W.2d 547 (Tex. Crim. App. 1978).

7 Fla.—Brice v. State, 411 So. 2d 934 (Fla. 2d DCA 1982).
Mich.—People v. Ojaniemi, 93 Mich. App. 200, 285 N.W.2d 816 (1979).

8 U.S.—Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).
Ga.—Hughes v. Hinks, 249 Ga. 416, 291 S.E.2d 545 (1982).
Md.—Herold v. State, 52 Md. App. 295, 449 A.2d 429 (1982).
Wyo.—Mason v. State, 631 P.2d 1051 (Wyo. 1981).

9 Mich.—People v. Hardin, 70 Mich. App. 204, 245 N.W.2d 566 (1976).
Knowing and understanding waiver required
The due process procedures which must precede revocation of an order admitting a defendant to probation may be waived by any adult or by one under 18 years of age, with the advice of counsel, if such a waiver is knowingly and understandingly made.
Ill.—People v. Coffman, 83 Ill. App. 2d 272, 227 N.E.2d 108 (4th Dist. 1967).

10 Fla.—Franklin v. State, 356 So. 2d 1352 (Fla. 2d DCA 1978).

11 Cal.—People v. Johnson, 218 Cal. App. 4th 938, 160 Cal. Rptr. 3d 621 (2d Dist. 2013), review denied, (Nov. 13, 2013).

12 N.M.—State v. Leon, 2013-NMCA-011, 292 P.3d 493 (N.M. Ct. App. 2012), cert. denied, 2013-NMCERT-001, 299 P.3d 863 (N.M. 2013) and cert. quashed, 2013-NMCERT-010, 313 P.3d 251 (N.M. 2013).

13 U.S.—U.S. v. Wickham, 618 F.2d 1307 (9th Cir. 1979); Thomas v. U.S., 391 F. Supp. 202 (W.D. Pa. 1975).
Pa.—Com. v. Sinclair, 245 Pa. Super. 287, 369 A.2d 407 (1976).

14 U.S.—U.S. v. Johnson, 563 F.2d 362 (8th Cir. 1977).

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16C C.J.S. Constitutional Law § 1788

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Constitutional Law
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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

6. Revocation of Probation, Suspension of Sentence, or Parole

a. Revocation of Probation or Suspension of Sentence

(2) Notice and Final Hearing

§ 1788. Requisites and sufficiency of notice and final hearing regarding revocation of probation

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4733(2), 4734

Due process, in a probation revocation hearing, requires disclosure of the evidence against a probationer, an opportunity to be heard in person and to present evidence, and a right to confront and cross-examine adverse witnesses.

Although a probation revocation hearing is not a criminal trial,[1] it must meet certain due process standards.[2] A probation revocation hearing, to be consistent with due process, must be held before a neutral and detached hearing body.[3] Due process is not denied by conducting a revocation hearing before the same judge who granted probation,[4] but due process is denied if the decisionmaker is the correctional official who made the initial report of the violation of the conditions of probation or who recommended revocation.[5]

Due process, in a probation revocation hearing, requires disclosure of the evidence against a probationer,[6] the opportunity to be heard in person[7] and to present witnesses and documentary evidence,[8] and the right to confront and cross-examine adverse

witnesses[9] unless the hearing officer specifically finds good cause for not allowing confrontation.[10] Furthermore, a probationer has a due process right to explain any mitigating circumstances and argue that the ends of justice do not warrant revocation of probation.[11]

Revocation of suspension of sentence.

To satisfy a defendant's right to procedural due process in a circumstance where the State seeks to revoke a suspended sentence, the record must show that the following procedures have been afforded: (1) written notice of the conduct which triggers the sought-after incarceration; (2) disclosure to the defendant of the evidence against the defendant; (3) the opportunity to be heard in person and to present witnesses and evidence; (4) the right to confront and cross-examine adverse witnesses; (5) a statement in the record by the court indicating in substance the evidence relied upon and the reasons for imposing commitment; and (6) representation by counsel, to be appointed by the court if the defendant is indigent.[12]

CUMULATIVE SUPPLEMENT

Cases:

Trial court's error in admitting Interstate Compact Offender Tracking System (ICOTS) documents, which were not sufficiently reliable so as to justify denying probationer his right of confrontation in probation revocation case, was not harmless; without these documents, there was no evidence establishing that probationer consumed alcohol in violation of his probation condition, and the erroneously admitted ICOTS documents constituted the entirety of the State's evidence in support of its complaint that probationer violated his probation. U.S.C.A. Const.Amend. 6. State v. Eldert, 2015 VT 87, 125 A.3d 139 (Vt. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Mich.—People v. Rocha, 86 Mich. App. 497, 272 N.W.2d 699 (1978).

2 Ind.—Madden v. State, 25 N.E.3d 791 (Ind. Ct. App. 2015).
Fundamental fairness
Due process provisions contemplate that any revocation hearing involving a probationer must comport with principles of fundamental fairness.
U.S.—U.S. v. Tyler, 605 F.2d 851 (5th Cir. 1979).

3 U.S.—Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).
Ind.—Madden v. State, 25 N.E.3d 791 (Ind. Ct. App. 2015).
Kan.—State v. McGill, 51 Kan. App. 2d 92, 340 P.3d 515 (2015).
Miss.—Celestine v. State, 143 So. 3d 633 (Miss. Ct. App. 2014).
Freedom from bias
Due process requires that there at least be a fair hearing free from bias or prejudice of the judge.
U.S.—U.S. v. Sciuto, 531 F.2d 842 (7th Cir. 1976).

4 Ill.—People v. Harden, 6 Ill. App. 3d 172, 284 N.E.2d 716 (2d Dist. 1972).
Tex.—Whisenant v. State, 557 S.W.2d 102 (Tex. Crim. App. 1977).

5 Ariz.—State v. Turnbull, 114 Ariz. 289, 560 P.2d 807 (Ct. App. Div. 1 1977).

6 U.S.—Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).
Ind.—Madden v. State, 25 N.E.3d 791 (Ind. Ct. App. 2015).
Kan.—State v. McGill, 51 Kan. App. 2d 92, 340 P.3d 515 (2015).
Miss.—Celestine v. State, 143 So. 3d 633 (Miss. Ct. App. 2014).

A.L.R. Library

Availability of discovery at probation revocation hearings, 52 A.L.R.5th 559.

7 U.S.—Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).
Ind.—Madden v. State, 25 N.E.3d 791 (Ind. Ct. App. 2015).
Kan.—State v. McGill, 51 Kan. App. 2d 92, 340 P.3d 515 (2015).
Miss.—Celestine v. State, 143 So. 3d 633 (Miss. Ct. App. 2014).

8 U.S.—Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).
Ind.—Madden v. State, 25 N.E.3d 791 (Ind. Ct. App. 2015).
Kan.—State v. McGill, 51 Kan. App. 2d 92, 340 P.3d 515 (2015).
Miss.—Celestine v. State, 143 So. 3d 633 (Miss. Ct. App. 2014).

9 U.S.—Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).
Ind.—Madden v. State, 25 N.E.3d 791 (Ind. Ct. App. 2015).
Kan.—State v. McGill, 51 Kan. App. 2d 92, 340 P.3d 515 (2015).
Miss.—Celestine v. State, 143 So. 3d 633 (Miss. Ct. App. 2014).

Laboratory technician

The defendant in a probation revocation proceeding had a due process right to confront a laboratory technician who had prepared two urinalysis reports indicating that the defendant had consumed alcohol; the defendant had a substantial interest in the confrontation since the report was the primary evidence of defendant's alleged violation, the defendant was not given any meaningful chance to refute the accuracy of that evidence, the State's only proffered reason for not producing the technician was that it had reviewed the case law and determined that it was not required to make the technician available to testify despite having been given approximately two weeks for the express purpose of doing just that, and information in the results was not corroborated by any other source and the State offered no evidence that tended to show that the urinalysis tests of the types performed were inherently reliable.

Or.—State v. Nelson, 2001 MT 236, 307 Mont. 34, 36 P.3d 405 (2001).

10 U.S.—Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).
Ind.—Madden v. State, 25 N.E.3d 791 (Ind. Ct. App. 2015).
Kan.—State v. Marquis, 292 Kan. 925, 257 P.3d 775 (2011).
Miss.—Celestine v. State, 143 So. 3d 633 (Miss. Ct. App. 2014).

11 U.S.—U.S. v. Ferguson, 624 F.2d 81 (9th Cir. 1980); U.S. v. Diaz-Burgos, 601 F.2d 983 (9th Cir. 1979).

Insanity defense

(1) Due process required resolution of the issue of whether insanity was a defense to a probation violation where the hearing was confined to evidence of the defendant's mental state in committing admitted acts.

Cal.—People v. Breaux, 101 Cal. App. 3d 468, 161 Cal. Rptr. 653 (1st Dist. 1980).

(2) Due process did not require the court to consider the defense of insanity in a probation revocation proceeding; the welfare and safety of society outweigh the interest of a probationer who has violated a condition of probation while sane or insane.

Ohio—State v. Bell, 66 Ohio App. 3d 52, 583 N.E.2d 414 (5th Dist. Stark County 1990).

12 N.H.—State v. LaPlaca, 162 N.H. 174, 27 A.3d 719 (2011).

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16C C.J.S. Constitutional Law § 1789

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Constitutional Law
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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

6. Revocation of Probation, Suspension of Sentence, or Parole

a. Revocation of Probation or Suspension of Sentence

(2) Notice and Final Hearing

§ 1789. Requisites and sufficiency of notice and final hearing regarding revocation of probation—Representation by counsel

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4733(2)

Due process does not require that a probationer be represented by counsel in all probation revocation hearings, but there are some cases in which, as a matter of due process, a probationer is entitled to appointment of counsel.

Due process generally does not require that a probationer be represented by counsel in all probation revocation hearings.[1] However, there are some cases in which, as a matter of due process, a probationer is entitled to appointment of counsel.[2] Counsel should be provided in cases where, after being informed of the right to request counsel, the probationer makes such a request, based on a timely and colorable claim that the probationer has not committed the alleged violation, or that, even if the violation is a matter of record or uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.[3] In any event, the responsible agency should consider whether the probationer appears capable of speaking effectively for him- or herself.[4]

Due process requires that the State provide a probationer with counsel when a violation-of-probation hearing follows an acquittal after a criminal trial for the same alleged conduct.[5]

CUMULATIVE SUPPLEMENT

Cases:

The suspension of a sentence coupled with probation is a critical stage of the trial proceedings and due process of law, therefore, requires that an accused be furnished the assistance of counsel and that counsel be present when the terms or conditions of probation are established or modified. U.S.C.A. Const.Amends. 6, 14. State v. Hedrick, 778 S.E.2d 666 (W. Va. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).
Mont.—Petition of Doney, 164 Mont. 330, 522 P.2d 92 (1974).
Wis.—State v. Evans, 77 Wis. 2d 225, 252 N.W.2d 664 (1977).
No right to counsel when probation lawfully extended
There is no statutory right or constitutional due process obligation to provide a probationer with counsel when his or her probation is lawfully extended as statutorily allowed.
Kan.—State v. McDonald, 272 Kan. 222, 32 P.3d 1167 (2001).

2 U.S.—Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).
Cal.—People v. Bauer, 212 Cal. App. 4th 150, 150 Cal. Rptr. 3d 804 (4th Dist. 2012).
Deprivation of effective assistance of counsel
Unless an attorney is given a reasonable opportunity to prepare, a defendant is deprived of effective assistance of counsel and denied due process.
Ill.—People v. Dixon, 26 Ill. App. 3d 487, 325 N.E.2d 673 (1st Dist. 1975).
Ind.—Smith v. State, 261 Ind. 510, 307 N.E.2d 281 (1974).
Necessity of appointment determined on case-by-case basis
Under the Due Process Clause of the Fourteenth Amendment, appointment of a counsel to represent a probationer must be determined on a case-by-case basis, and the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings; it is only in a probation revocation proceeding in which fundamental fairness, which is the touchstone of due process, mandates appointment of counsel that the State will be required to provide the probationer with legal representation.
Ga.—Vaughn v. Rutledge, 265 Ga. 773, 462 S.E.2d 132 (1995).

3 U.S.—Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).
Md.—McRoy v. State, 24 Md. App. 321, 330 A.2d 693 (1975).
Indecent assault and battery on a child
A probationer was entitled to appointed counsel, pursuant to due process principles, at a probation revocation hearing at which it was alleged that the probationer violated the terms of probation by committing an indecent assault and battery on a child, where the issues at the hearing were complex and not capable of being presented or defended adequately by someone untrained in the law, and the likelihood of imprisonment was high if it were determined that probationer violated the terms and conditions of his probation.
Mass.—Com. v. Patton, 458 Mass. 119, 934 N.E.2d 236 (2010).

4 U.S.—Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).
Wis.—State ex rel. Hawkins v. Gagnon, 64 Wis. 2d 394, 219 N.W.2d 252 (1974).

5 Del.—Cruz v. State, 990 A.2d 409 (Del. 2010).

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16C C.J.S. Constitutional Law § 1790

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Constitutional Law
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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

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6. Revocation of Probation, Suspension of Sentence, or Parole

a. Revocation of Probation or Suspension of Sentence

(2) Notice and Final Hearing

§ 1790. Requisites and sufficiency of notice and final hearing regarding revocation of probation—Evidence

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4733(2)

The use of hearsay evidence in probation revocation proceedings generally is, per se, consistent with due process, but if hearsay evidence is introduced in unreasonable abundance and its substantive reliability is highly suspect, its use violates due process.

The trial court is not bound by strict rules of evidence during a probation revocation hearing.[1] A probationer's right of confrontation is subject to relaxed due process standards that may permit introduction of evidence such as letters, affidavits, and other material that would not be admissible in an adversary criminal trial.[2]

In general, the use of hearsay evidence in probation revocation proceedings is, per se, consistent with due process.[3] Stated conversely, the constitutional guarantee of due process does not place a per se prohibition on the use of hearsay evidence at

probation revocation hearings.[4] Due process is not offended by the admission of hearsay evidence that a judge determines to be substantially reliable or for which good cause is otherwise shown.[5] However, if hearsay evidence is introduced in unreasonable abundance and its substantive reliability is highly suspect, its use violates due process.[6] Thus, while not every use of hearsay evidence in probation revocation proceedings violates due process, the evidence must be carefully weighed to be sure that there is strong indicia of reliability.[7]

Unsubstantiated and unreliable hearsay cannot, consistent with due process, be the sole basis for a probation revocation, but when hearsay is reliable, it can be the sole basis for a probation revocation.[8] If the prosecution has good cause for not using a witness with personal knowledge at a probation revocation hearing, and instead offers reliable hearsay or other evidence, the requirements of due process are satisfied.[9]

Out-of-court statements that qualify as testimonial, and thus that are not admissible, under the Confrontation Clause of the United States Constitution unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness, include at a minimum prior testimony at the preliminary hearing, testimony before a grand jury or at a former trial, and statements elicited during police interrogations.[10] However, while the Confrontation Clause dictates the manner in which witnesses give testimony in criminal trials, commanding not that evidence be reliable but that reliability be assessed by testing in the crucible of cross-examination, probation revocation is governed by the minimum requirements of due process and is a process flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.[11]

Discovery.

A probationer does not have a due process right to discovery;[12] and due process does not necessarily require the government to disclose the identity of an informant whose information leads to revocation of probation.[13] However, in particular circumstances, facts may exist which make a denial of discovery a denial of due process.[14]

Illegally obtained evidence.

Illegally obtained evidence may, without violating due process, be admitted in probation revocation hearings.[15] However, the due process guaranty precludes the use of false testimony to obtain a revocation of probation even if the testimony goes only to the credibility of a witness.[16]

Standard of proof.

Due process in a probation revocation hearing generally is satisfied with proof by a preponderance of the evidence.[17] It has also been stated that a revocation of probation satisfies the Due Process Clause as long as the revocation decision is supported by some evidence.[18] At the federal district court level of a proceeding to revoke supervised release, the government has the burden of proving by a preponderance of evidence that at least one of the conditions of the defendant's supervised release was violated.[19]

Judicial notice.

No denial of due process occurs where an attorney in a probation revocation proceedings based upon prior criminal proceedings has a copy of the record of the trial of the prior proceedings, of which the court in the revocation proceedings is taking judicial notice, although said attorney did not represent the defendant in the prior proceeding.[20]

Footnotes

1 Colo.—People v. Kelly, 919 P.2d 866 (Colo. App. 1996).

2 Okla.—Hampton v. State, 2009 OK CR 4, 203 P.3d 179 (Okla. Crim. App. 2009).

3 Me.—State v. Caron, 334 A.2d 495 (Me. 1975).

4 Mass.—Com. v. Durling, 407 Mass. 108, 551 N.E.2d 1193 (1990).

5 Mass.—Com. v. Wilcox, 446 Mass. 61, 841 N.E.2d 1240 (2006).

Okla.—Hampton v. State, 2009 OK CR 4, 203 P.3d 179 (Okla. Crim. App. 2009).

A.L.R. Library

Sufficiency of Hearsay Evidence in Probation Revocation Hearings, 21 A.L.R.6th 771.

6 Me.—State v. Caron, 334 A.2d 495 (Me. 1975).

Hearsay as sole basis of revocation

A probationer's due process rights were violated in a probation revocation hearing where hearsay evidence, consisting of nothing more than a probation officer's report and a certified copy of a federal arrest warrant, formed the sole basis of revocation.

Ala.—Ex parte Belcher, 556 So. 2d 366 (Ala. 1989).

7 Wyo.—Mason v. State, 631 P.2d 1051 (Wyo. 1981).

8 Mass.—Com. v. Bukin, 467 Mass. 516, 6 N.E.3d 515 (2014).

Hearsay not demonstrably reliable

Hearsay testimony that two young girls had reported an indecent exposure incident allegedly involving the defendant was not demonstrably reliable, as required by the due process right to confront witnesses at a hearing to revoke the defendant's special sexual offender sentencing alternative sentence where, even though the incident occurred near the defendant's work place and the defendant could not account for his whereabouts, there was no information regarding how the girls made their identification of the defendant.

Wash.—State v. Dahl, 139 Wash. 2d 678, 990 P.2d 396 (1999).

9 Mass.—Com. v. Durling, 407 Mass. 108, 551 N.E.2d 1193 (1990).

Reliable, factually detailed hearsay sufficient

Production of the victim of alleged assaults to prove the case for revocation of the defendant's probation was not necessary; reliable, factually detailed hearsay would have been sufficient for the purposes of due process.

Mass.—Com. v. Maggio, 414 Mass. 193, 605 N.E.2d 1247 (1993).

No showing of good cause for not allowing confrontation

Where the probation officer who prepared entries in the probation record did not appear at the revocation hearing and there was no showing that said officer was unavailable or that there was good cause for not allowing confrontation, admission of testimony concerning the contents of the record denied the probationer due process.

Ohio—State v. Miller, 42 Ohio St. 2d 102, 71 Ohio Op. 2d 74, 326 N.E.2d 259 (1975).

10 U.S.—Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004).

11 D.C.—Young v. U.S., 863 A.2d 804 (D.C. 2004).

Admission of preliminary hearing testimony

Admission of the transcript of testimony by a state's witness at the preliminary hearing on criminal charges stemming from the same incident on which the alleged probation violations were based did not violate the defendants' due process rights, where the defendants had ample opportunity to cross-examine the witness at the preliminary examination and where the transcript admitted at the probation revocation hearing included defense counsel's cross-examination.

Cal.—People v. Cambitsis, 101 Cal. App. 3d 141, 161 Cal. Rptr. 441 (1st Dist. 1980).

12 Ill.—People v. DeWitt, 78 Ill. 2d 82, 34 Ill. Dec. 319, 397 N.E.2d 1385 (1979).

13 U.S.—Carver v. England, 470 F. Supp. 900 (E.D. Tenn. 1978), aff'd, 599 F.2d 1055 (6th Cir. 1979).

Ill.—People v. Nordstrom, 73 Ill. App. 2d 168, 219 N.E.2d 151 (2d Dist. 1966).

14 Fla.—Sukert v. State, 325 So. 2d 439 (Fla. 3d DCA 1976).

A.L.R. Library

Availability of discovery at probation revocation hearings, 52 A.L.R.5th 559.

15 Cal.—People v. Nixon, 131 Cal. App. 3d 687, 183 Cal. Rptr. 878 (4th Dist. 1982).

16 R.I.—State v. Marrapese, 122 R.I. 494, 409 A.2d 544 (1979).

17 Ind.—Sparks v. State, 983 N.E.2d 221 (Ind. Ct. App. 2013), aff'd on reh'g, 985 N.E.2d 1140 (Ind. Ct. App. 2013).

18 U.S.—Jenkins v. Morgan, 28 F. Supp. 3d 270 (D. Del. 2014).

19 U.S.—U.S. v. Whalen, 82 F.3d 528 (1st Cir. 1996).

20 Tex.—Bradley v. State, 608 S.W.2d 652 (Tex. Crim. App. 1980).

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16C C.J.S. Constitutional Law § 1791

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Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

6. Revocation of Probation, Suspension of Sentence, or Parole

a. Revocation of Probation or Suspension of Sentence

(2) Notice and Final Hearing

§ 1791. Findings and statement regarding revocation of probation; judgment or order and sentence

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4733(2)

Due process requires a written statement by the fact finder as to the evidence relied on and the reasons for revoking probation.

Due process requires a written statement by the fact finder as to the evidence relied on and the reasons for revoking probation,[1] and pro forma language, routine phrases,[2] or conclusory reasons[3] will not satisfy this requirement. However, due process does not generally require a court to indicate that it has considered alternatives to incarceration before revoking probation.[4]

In general, fundamental due process requires that a revocation of probation be based only on violations alleged in the notice given to the probationer.[5] However, where the probationer acquiesces to the development of evidence relating to other grounds for revocation,[6] or fails to challenge the adequacy of the notice,[7] or where the conduct charged in the notice is clearly established

and far outweighs other grounds for revocation stated by the court,[8] the statement by the court of grounds for revocation other than those given in the notice does not deny due process.

A court's failure to make written findings does not deny a probationer due process where the court's oral opinion is contained in the record and indicates the evidence relied on, as well as the reasons for revocation.[9] In order to comply with due process, however, the finding of a probation violation must be based only on verified facts[10] so that the exercise of discretion will be informed by an accurate knowledge of the probationer's behavior.[11]

In any event, due process is not denied by revoking probation for violating the conditions of probation of which the probationer has been given notice[12] as long as there is adequate proof of the violations.[13] A probation revocation based on an offense for which a probationer has not been convicted does not deny due process.[14]

Judgment or order and sentence.

In general, after the initial determination that a condition of probation has been violated, due process requires that alternatives to incarceration consonant with society's protection and the probationer's rehabilitation be considered.[15] In any event, a greater punishment cannot be imposed in an order revoking probation than was fixed in the original judgment of conviction without violating due process.[16]

CUMULATIVE SUPPLEMENT

Cases:

Sentencing court's explicit statement, that it had given consideration to each of the relevant statutory sentencing factors when imposing the supervised release revocation sentence, was entitled to significant weight when defendant claimed on appeal that the sentencing court failed adequately to assess the relevant sentencing factors. 18 U.S.C.A. §§ 3553(a), 3583(e). United States v. Daoust, 888 F.3d 571 (1st Cir. 2018).

Offender's due process rights were violated when he did not receive written statement describing evidence relied upon or reason for revoking his post-incarceration supervision; regulation required that offender be given written notification of Parole Board's decision within 21 days from date of decision and that written determination include brief statement identifying reasons for determination and evidence relied upon. U.S. Const. Amend. 14; 501 Ky. Admin. Regs. 1:070. Jones v. Bailey, 576 S.W.3d 128 (Ky. 2019).

Although the district court's decision to revoke a defendant's probation must be based upon verified facts and the defendant must be afforded due process, all that is necessary to uphold the district court's decision is evidence that it made a conscientious judgment, after hearing the facts, that the defendant willfully violated a condition of his or her probation. U.S. Const. Amend. 14; Wyo. R. Crim. P. 39. Brumme v. State, 2018 WY 115, 428 P.3d 436 (Wyo. 2018).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973); U.S. v. Martinez, 650 F.2d 744 (5th Cir. 1981).
Ind.—Madden v. State, 25 N.E.3d 791 (Ind. Ct. App. 2015).
Kan.—State v. McGill, 51 Kan. App. 2d 92, 340 P.3d 515 (2015).
Miss.—Celestine v. State, 143 So. 3d 633 (Miss. Ct. App. 2014).
Utah—State v. Legg, 2014 UT App 80, 324 P.3d 656 (Utah Ct. App. 2014).
Calendar entry insufficient
A court's calendar entry revoking probation, which does not indicate what evidence the court has relied on in revoking probation, does not satisfy the due process requirement for revoking probation of written findings showing a factual basis for revocation.
Iowa—State v. Lillibridge, 519 N.W.2d 82 (Iowa 1994).

2 U.S.—U.S. v. Martinez, 650 F.2d 744 (5th Cir. 1981).

3 U.S.—U.S. v. Lacey, 648 F.2d 441 (5th Cir. 1981).

4 U.S.—Black v. Romano, 471 U.S. 606, 105 S. Ct. 2254, 85 L. Ed. 2d 636 (1985).

5 Kan.—State v. McGill, 51 Kan. App. 2d 92, 340 P.3d 515 (2015).

6 Wash.—State v. Myers, 86 Wash. 2d 419, 545 P.2d 538 (1976).

7 Pa.—Com. v. Gamble, 246 Pa. Super. 222, 369 A.2d 892 (1977).
Wis.—State ex rel. Hanson v. Department of Health and Social Services, 64 Wis. 2d 367, 219 N.W.2d 267 (1974).

8 Mich.—People v. Hunter, 106 Mich. App. 821, 308 N.W.2d 694 (1981).

9 Me.—State v. Sommer, 388 A.2d 110 (Me. 1978).
Mass.—Fay v. Com., 379 Mass. 498, 399 N.E.2d 11 (1980).
Mo.—Abel v. Wyrick, 574 S.W.2d 411 (Mo. 1978).
Written findings coupled with oral findings
The trial court's written findings, coupled with its oral findings, regarding the evidence relied on and the reason for revoking probation satisfied due process in probation revocation proceedings; although the written findings were sparse, stating that the testimony at the hearing led to a conclusion that probationer violated his probation, the trial court's oral findings stated that probation was revoked based on probationer's consuming alcohol and assaulting his family members, both clear violations of probation conditions.
Ky.—Barker v. Com., 379 S.W.3d 116 (Ky. 2012).

10 Me.—State v. Caron, 334 A.2d 495 (Me. 1975).
Nev.—Anaya v. State, 96 Nev. 119, 606 P.2d 156 (1980).
Wash.—State v. Lawrence, 28 Wash. App. 435, 624 P.2d 201 (Div. 2 1981).

11 Me.—State v. Caron, 334 A.2d 495 (Me. 1975).
Nev.—Anaya v. State, 96 Nev. 119, 606 P.2d 156 (1980).

12 U.S.—U.S. v. Wilson, 469 F.2d 368 (2d Cir. 1972).
Ga.—Young v. State, 152 Ga. App. 108, 262 S.E.2d 258 (1979).
Tex.—Franklin v. State, 632 S.W.2d 839 (Tex. App. Houston 14th Dist. 1982).

13 U.S.—Douglas v. Buder, 412 U.S. 430, 93 S. Ct. 2199, 37 L. Ed. 2d 52 (1973); U.S. v. Reed, 573 F.2d 1020 (8th Cir. 1978).
Ariz.—State v. Williams, 122 Ariz. 146, 593 P.2d 896 (1979).
No evidence
If an order revoking probation is based on no evidence, rather than merely insufficient evidence, there is a violation of due process.
Tex.—Ex parte Moffett, 542 S.W.2d 184 (Tex. Crim. App. 1976).
Showings required
Substantive due process is satisfied if revocation of probation is based on the State's showing that the probationer willfully failed to abide by the conditions of the probation and the probationer's failing to show that the violation resulted from factors beyond his or her control and through no fault of the probationer's own.
Md.—Herold v. State, 52 Md. App. 295, 449 A.2d 429 (1982).

14 Fla.—Russ v. State, 313 So. 2d 758 (Fla. 1975).
Ill.—People v. Williams, 29 Ill. App. 3d 577, 331 N.E.2d 181 (1st Dist. 1975).

Tex.—Bradley v. State, 608 S.W.2d 652 (Tex. Crim. App. 1980).

15 Mo.—Sincup v. Blackwell, 608 S.W.2d 389 (Mo. 1980).

16 Ky.—Hord v. Com., 450 S.W.2d 530 (Ky. 1970).

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

J. Judgment, Sentence, and Punishment; Appeal and Error

6. Revocation of Probation, Suspension of Sentence, or Parole

b. Revocation of Parole

(1) In General

§ 1792. Revocation of parole, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4838

Due process rights must be afforded in proceedings to revoke parole, but the full panoply of due process rights afforded a defendant in a criminal proceeding is not required.

The liberty of a parolee, although conditional, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss"; therefore, due process rights must be afforded in proceedings to revoke parole.[1] However, parole revocation does not call for the full panoply of due process rights afforded a defendant in a criminal proceeding.[2]

In order to comport with due process, a two-step procedure generally must be followed before parole may be revoked.[3] A parolee is entitled to a preliminary hearing to determine whether there is probable cause to believe that the parolee has violated the conditions of parole,[4] followed by a final revocation hearing to determine whether, in light of the violation, parole should

be revoked.[5] However, under certain circumstances, two separate hearings are not required, and a proper consolidated hearing may satisfy due process.[6]

Delay in execution of violation warrant.

The mere lapse of time or delay in the execution of a parole violator's warrant, without more, does not violate due process.[7] Under a due process analysis, the length of time between the issuance and execution of a parole violation warrant is but one factor in determining its continuing validity, and a delay in execution must be unreasonable before due process is affected.[8] Timely objection to the delay, unavailability of witnesses, lost sources of mitigating evidence, the violator's own conduct as a contributing cause of the delay, and the parole board's reasons for the delay are factors which also must weigh in the balance when determining whether there has been a violation of due process.[9]

Review.

Due process requires that a parole revocation decision be subject to judicial review.[10] A remand which allows an agency of the State a second shot at establishing grounds for parole revocation violates the standards of due process applicable to parole revocation procedures.[11] Similarly, a remand which directs or permits supplementing the record by additional evidence violates the concept of due process, and such a second hearing is analogous to allowing a second trial to "shore up" the record to support the judgment, which also violates due process.[12]

Footnotes

1 U.S.—Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).
Mass.—Doucette v. Massachusetts Parole Bd., 86 Mass. App. Ct. 531, 18 N.E.3d 1096 (2014).
Due process applicable to conditional liberty of paroled criminal
Vt.—G.T. v. Stone, 159 Vt. 607, 622 A.2d 491 (1992).

2 U.S.—Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).
Fla.—Russ v. State, 313 So. 2d 758 (Fla. 1975).
N.Y.—McLucas v. Oswald, 40 A.D.2d 311, 339 N.Y.S.2d 760 (3d Dep't 1973).
Wyo.—Mason v. State, 631 P.2d 1051 (Wyo. 1981).
Effect of discretion to grant parole
A statute vesting discretion in a parole authority to grant parole creates no expectancy of parole or constitutional liberty sufficient to establish a right of procedural due process, and thus, the authority has discretion to rescind an unexecuted order for a prisoner to receive parole at a future date without providing a hearing.
Ohio—Hattie v. Anderson, 68 Ohio St. 3d 232, 1994-Ohio-517, 626 N.E.2d 67 (1994).

3 U.S.—Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).
Cal.—In re Becker, 48 Cal. App. 3d 288, 121 Cal. Rptr. 759 (3d Dist. 1975).
Wyo.—Mason v. State, 631 P.2d 1051 (Wyo. 1981).

4 § 1793.

5 § 1794.

6 Or.—Vrieling v. Oregon State Bd. of Parole, 21 Or. App. 245, 534 P.2d 516 (1975).

7 U.S.—Gaddy v. Michael, 519 F.2d 669 (4th Cir. 1975); Schoffner v. U.S. Bd. of Parole, 416 F. Supp. 759 (M.D. Pa. 1976), aff'd, 547 F.2d 1164 (3d Cir. 1977).
N.Y.—People ex rel. Allen v. Warden of George Motcham Detention Center, 39 Misc. 3d 546, 959 N.Y.S.2d 881 (Sup 2013).

8 La.—State v. Langley, 711 So. 2d 651 (La. 1998), on reh'g in part, (June 19, 1998).

9 U.S.—Gaddy v. Michael, 519 F.2d 669 (4th Cir. 1975); Schoffner v. U.S. Bd. of Parole, 416 F. Supp. 759 (M.D. Pa. 1976), aff'd, 547 F.2d 1164 (3d Cir. 1977).

Three-year delay

A delay of three years in executing a parole violation warrant and giving the parolee notice of its issuance did not result in a denial of due process to the parolee, who violated the parole agreement and who acknowledged, in the agreement, that he understood that his failure to comply with the conditions in any manner would result in his return to custody.

U.S.—Parham v. Warden, Bridgeport Correctional Center, 172 Conn. 126, 374 A.2d 137 (1976).

10 N.Y.—Arthurs v. Regan, 69 Misc. 2d 363, 330 N.Y.S.2d 133 (Sup 1972), judgment aff'd, 41 A.D.2d 214, 341 N.Y.S.2d 957 (2d Dep't 1973).

11 Wis.—State ex rel. Gibson v. Department of Health and Social Services, 86 Wis. 2d 345, 272 N.W.2d 395 (Ct. App. 1978).

12 Wis.—Snajder v. State, 74 Wis. 2d 303, 246 N.W.2d 665 (1976).

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J. Judgment, Sentence, and Punishment; Appeal and Error

6. Revocation of Probation, Suspension of Sentence, or Parole

b. Revocation of Parole

(1) In General

§ 1793. Notice and preliminary parole revocation hearing

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4838

With respect to a preliminary parole revocation hearing, due process requires that the parolee be given notice that the hearing will take place and that its purpose is to determine whether there is probable cause to believe the parolee has committed a parole violation.

With respect to a preliminary parole revocation hearing, due process requires that the parolee be given notice that the hearing will take place[1] and that its purpose is to determine whether there is probable cause to believe the parolee has committed a parole violation.[2] Generally, on an arrest for a parole violation, due process requires an inquiry in the nature of a preliminary hearing to determine whether there is probable cause or reasonable grounds to believe that a parolee committed acts which constitute a violation of parole conditions.[3]

Since a preliminary parole revocation hearing is ordinarily required by due process because a parolee is subject to a loss of liberty pending a final hearing, where a parolee is already in custody on charges and for reasons separate from the revocation proceedings, a preliminary hearing is not required.[4] Furthermore, where conduct which constitutes a prima facie violation of parole is independently charged as a new crime, a preliminary hearing on the new offense satisfies the due process requirement for a preliminary revocation hearing[5] as long as the parolee has fair notice of the nature and effect of a hearing intended to serve such a dual purpose.[6] Moreover, an extradition hearing for a parolee who has left the state is a suitable substitute for a prerevocation hearing and satisfies the due process requirement.[7]

Notice of preliminary hearing.

The notice of a preliminary hearing must state the time and place of the hearing[8] and what parole violations have been alleged.[9]

Requisites and sufficiency of hearing.

A preliminary parole revocation hearing must be conducted in accordance with certain due process requirements.[10] Such a hearing must be conducted by someone, not necessarily a judicial officer,[11] who is not directly involved in the case.[12] Furthermore, a preliminary parole revocation hearing should be conducted at or reasonably near the place of the alleged parole violation or the arrest[13] and as promptly as is convenient after the alleged parole violation or the arrest[14] while information is fresh and sources are available.[15]

At a preliminary parole revocation hearing, a parolee has a due process right to appear and speak in the parolee's own behalf and present documentary evidence and witnesses.[16] Due process also requires at such a hearing that, on the request of a parolee, a person who has given adverse information on which revocation is to be based be made available for questioning in the parolee's presence,[17] but if the hearing officer finds that an informant would risk harm if the informant's identity were revealed, confrontation and cross-examination are not mandated by due process.[18]

Representation by counsel.

Whether the assistance of counsel at a preliminary parole revocation hearing is required by due process depends on the peculiarities of a particular case, and the decision should be made on a case-by-case basis in the exercise of the sound discretion of the parole board.[19]

Footnotes

1 U.S.—Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).
Cal.—In re Melendez, 37 Cal. App. 3d 967, 112 Cal. Rptr. 755 (1st Dist. 1974).
Wis.—State ex rel. Flowers v. Department of Health and Social Services, 81 Wis. 2d 376, 260 N.W.2d 727 (1978).

2 U.S.—Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).
Mo.—Moore v. Stamps, 507 S.W.2d 939 (Mo. Ct. App. 1974).

3 U.S.—Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).
Cal.—Williams v. Superior Court, 230 Cal. App. 4th 636, 178 Cal. Rptr. 3d 685 (4th Dist. 2014).
Preliminary and final hearings required

The Due Process Clause of the Fourteenth Amendment of the United States Constitution requires that a parolee receive a preliminary hearing in order to determine whether there is probable cause for revocation, and upon a finding of probable cause, there must still be a second final hearing.

N.M.—Reed v. State ex rel. Ortiz, 1997-NMSC-055, 124 N.M. 129, 947 P.2d 86 (1997), cert. granted, judgment rev'd on other grounds, 524 U.S. 151, 118 S. Ct. 1860, 141 L. Ed. 2d 131 (1998).

As to the final hearing in a parole revocation proceeding, generally, see § 1794.

4 Okla.—Wilson v. State, 1980 OK CR 118, 621 P.2d 1173 (Okla. Crim. App. 1980).

5 Cal.—In re Law, 10 Cal. 3d 21, 109 Cal. Rptr. 573, 513 P.2d 621 (1973).

Pa.—Com. v. Holmes, 248 Pa. Super. 552, 375 A.2d 379 (1977).

6 Cal.—In re Law, 10 Cal. 3d 21, 109 Cal. Rptr. 573, 513 P.2d 621 (1973).

7 Cal.—In re Morales, 43 Cal. App. 3d 243, 117 Cal. Rptr. 645 (4th Dist. 1974).

8 Cal.—In re Williams, 36 Cal. App. 3d 649, 111 Cal. Rptr. 870 (3d Dist. 1974).

Mo.—Moore v. Stamps, 507 S.W.2d 939 (Mo. Ct. App. 1974).

Transfer of location

The transfer of a preliminary parole revocation hearing to another location, without adequate notice thereof to the parolee, vitiated the parolee's right to present witnesses in his own behalf and resulted in a denial of due process at the hearing.

N.Y.—People ex rel. Puma v. Warden, Queens House of Detention for Men, 76 Misc. 2d 336, 351 N.Y.S.2d 70 (Sup 1973).

9 U.S.—Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

Cal.—In re Melendez, 37 Cal. App. 3d 967, 112 Cal. Rptr. 755 (1st Dist. 1974).

Mo.—Moore v. Stamps, 507 S.W.2d 939 (Mo. Ct. App. 1974).

10 U.S.—Lee v. Pennsylvania Bd. of Probation & Parole, 467 F. Supp. 1043 (E.D. Pa. 1979).

Disclosure of evidence

The due process requirement of disclosure to a parolee of the evidence against the parolee applies as to the hearing-officer stage of revocation proceedings.

Iowa—Thomas v. State Bd. of Parole, 220 N.W.2d 874 (Iowa 1974).

11 U.S.—Atkins v. City of Chicago, 631 F.3d 823 (7th Cir. 2011).

12 U.S.—Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

Cal.—Williams v. Superior Court, 230 Cal. App. 4th 636, 178 Cal. Rptr. 3d 685 (4th Dist. 2014).

13 U.S.—Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

Cal.—Williams v. Superior Court, 230 Cal. App. 4th 636, 178 Cal. Rptr. 3d 685 (4th Dist. 2014).

14 U.S.—Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

Cal.—Williams v. Superior Court, 230 Cal. App. 4th 636, 178 Cal. Rptr. 3d 685 (4th Dist. 2014).

Failure to conduct timely hearing

A failure to conduct a timely preliminary parole revocation hearing, as provided for by statute, violates a parolee's right to due process unless the appropriate authority is able to establish that it could not conduct a hearing because the parolee was beyond its convenience and practical control.

N.Y.—People ex rel. Matthews v. New York State Div. of Parole, 95 N.Y.2d 640, 722 N.Y.S.2d 213, 744 N.E.2d 1149 (2001).

15 U.S.—Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); Atkins v. City of Chicago, 631 F.3d 823 (7th Cir. 2011).

16 U.S.—Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

Cal.—Williams v. Superior Court, 230 Cal. App. 4th 636, 178 Cal. Rptr. 3d 685 (4th Dist. 2014).

17 U.S.—Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

Cal.—In re Melendez, 37 Cal. App. 3d 967, 112 Cal. Rptr. 755 (1st Dist. 1974).

N.Y.—People ex rel. Lent v. McNulty, 83 Misc. 2d 723, 373 N.Y.S.2d 508 (Sup 1975).

18 U.S.—Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); U.S. v. Fatico, 579 F.2d 707, 3 Fed. R. Evid. Serv. 506 (2d Cir. 1978).

Cal.—In re Melendez, 37 Cal. App. 3d 967, 112 Cal. Rptr. 755 (1st Dist. 1974).

19 U.S.—Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).

N.Y.—People ex rel. Calloway v. Skinner, 33 N.Y.2d 23, 347 N.Y.S.2d 178, 300 N.E.2d 716 (1973).

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